(16,596.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 383

EDWARD M. WILLIS AND WILLIAM G. JOHNSON, ASSIGNEE, PETITIONERS,

vs.

THE EASTERN TRUST AND BANKING COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of District of Columbia	1	1
Complaint to justice of the peace	1	1
Plea of title	1	2
Rule prescribing form of plea	3	3
Declaration in plea of title	3	3
Agreed statement of facts	4	4
E. T. & B. Co., Exhibit No. 1—Act to incorporate the Eastern Trust and Banking Co.	8	8
E. T. & B. Co., Exhibit No. 2—Trust deed from American Ice Co. to the Eastern Trust and Banking Co., December 2, 1889	11	11
E. T. & B. Co., Exhibit No. 4—Agreement between Wm. G. Johnson, assignee, &c., and Edward M. Willis, January 29, 1894	19	19
Judgment in No. 36903	21	21
Judgment in No. 36904	21	21
Notice of appeal	22	22
Citation	22	22
Opinion	23	23
Stipulation as to record on appeal	26	26
Clerk's certificate	26	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 9, 1897.

	Original.	Print.
Minutes of argument	27	27
Opinion	27	27
Judgment	30	30
Order granting writ of error	30	30
Writ of error	31	31
Citation and acceptance of service	31	31
Bond	32	32
Writ of certiorari	33	32
Clerk's certificate and return	36	33

1 In the Court of Appeals of the District of Columbia.

THE "EASTERN TRUST AND BANKING COMPANY," Appellant,
vs.
EDWARD M. WILLIS and WILLIAM G. JOHNSON, Assignee. } No. 425.

Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO., Plaintiff,
vs.
EDWARD M. WILLIS, Defendant. } At Law. No. 36903.

EASTERN TRUST AND BANKING CO., Plaintiff,
vs.
WM. G. JOHNSON, Defendant. } At Law. No. 36904.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled causes, to wit:

Judgment.

Filed September 29, 1894.

Complaint of Landlord Against Tenant.

36903.

To Lewis I. O'Neal, justice of the peace for the District of Columbia:

Your complainant, Eastern Trust and Banking Company, a corporation duly established under a charter granted by the State of Maine, respectfully represents that it is entitled to the possession of the lands, tenements, and premises lying opposite to square two hundred and seventy (270), in the city of Washington, in the District of Columbia, described by metes and bounds as follows, to wit: Commencing for the same at the southeast corner of said square two hundred and seventy (270), thence southerly with the west line of Thirteenth street to the channel of the Potomac river; thence westerly with the said channel to a point opposite the southwest corner of said square; thence due north to the southwest corner of said square, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and fifty-five (255) feet and one (1) inch to the place of beginning, together with the improvements thereon and the rights and privileges thereto appertaining, and that the same

are detained from it and held without right by one Edward
2 M. Willis, of the District of Columbia, who became and was tenant by sufferance of the undersigned of said lands, tenements, and premises, and whose said tenancy and estate therein has been determined by the service of a thirty days' notice to quit on said Willis. Complainant therefore prays that a summons may be issued to a proper officer of said District, to be served upon said tenant by sufferance, holding over as aforesaid, commanding said tenant to appear before you on a day to be therein named, to show cause why judgment in favor of your complainant for the possession of said lands, tenements, and premises and costs accruing upon this application should not be rendered herein, agreeably to the act of Congress in such cases made and provided.

EASTERN TRUST AND BANKING COMPANY, *Complainant,*
By BENJAMIN F. LEIGHTON, *Its Attorney.*

Subscribed and sworn to before me this 17th day of September, A. D. 1894, by said Benjamin F. Leighton, as attorney for said corporation, complainant.

LEWIS I. O'NEAL. *J. P.* [SEAL.]

Plea of Title.

Filed September 29, 1894.

DISTRICT OF COLUMBIA, *County of Washington,* } *To wit:*

Before Lewis I. O'Neal, a justice of the peace in and for the District of Columbia, this 27th day of September, A. D. 1894.

EASTERN TRUST & BANKING CO., Plaintiff, *vs.* EDWARD M. WILLIS, Defendant. } No. 15280, 36903.

Plea.

Now comes the defendant in his proper person and, denying that he held the premises as in the written complaint of plaintiff alleged, says that the title to the said premises is in Wm. G. Johnson, under whom defendant claims the said premises, and that the said title hereby claimed is not derived from any letting of the premises by the plaintiff (or by those under whom the plaintiff claims), and is not derived from any forcible entry or forcible detainer.

EDWARD M. WILLIS, *Defendant.*

Subscribed and sworn to before me this 27th day of September, A. D. 1894.

LEWIS I. O'NEAL, *J. P.* [SEAL.]

NOTE.—If the title is in the defendant, he will so state. If it be in another, under whom the defendant claims, he must name that other and say "that the title is in —— ——, under whom he claims the said premises."

3 *Rule Supreme Court District of Columbia Prescribing Above Form of Plea, 2d M. G. T., p. 559.*

RULE.—"In any and every proceeding instituted before a justice of the peace under and by virtue of section 684, chapter XIX, of the Revised Statutes of the United States relating to the District of Columbia, if upon the trial the defendant, in order to avail himself of the provisions of section 687 of the Revised Statutes, wishes to plead title to the premises in himself or in another person under whom he claims the premises, the justice of the peace shall require the plea to be in writing and to be sworn to by the defendant. The plea shall be in the following (as given above) or equivalent form."

Any plea of the title not made as above required the justice shall treat as a nullity. Unless the plea of title be made as by this rule required, the proceedings before the justice shall not be suspended, but the justice shall go on with the trial and render judgment in the matter as the right of the case may require. Upon a plea of title being made by the defendant in conformity with this rule and upon the proceedings being certified to this court by the justice, the cause shall be docketed by the clerk and placed on the trial calendar in the same manner and subject to the same rules as appeals from a justice of the peace. The plaintiff shall, during the term of the circuit court occur-ing next after the pleading of title before the justice, file in said court a declaration making demand for the possession of the premises, and with a description thereof as in ejectment, and serve the defendant with a copy thereof. In any such declaration a general demand shall be sufficient to warrant an assessment of damages and intervening rent, as provided in section 690 of said Revised Statutes.

Declaration in Plea of Title.

Filed October 5, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff, *vs.* EDWARD M. WILLIS, Defendant. } At Law. No. 36903.

The plaintiff sues the defendant to recover the following-described property, situated in the District of Columbia, to wit: All those certain lands, tenement-, and premises lying opposite to square number two hundred and seventy (270), in the city of Washington, in the District of Columbia, described by metes and bonds as follows, to wit: Commencing for the same at the southeast corner of said square two hundred and seventy, thence southerly with the west line of Thirteenth street to the channel of the Potomac river;

thence westerly with the said channel to a point opposite
4 the southwest corner of said square; thence due north to the southwest corner of said square, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and fifty-five (255) feet and one (1) inch to the place of beginning, together with the improvements thereon and the rights and privileges thereto appertaining, in which plaintiff claims a fee-simple, and of which the plaintiff was lawfully possessed on the first day of January, 1894, when the defendant entered the same and unlawfully ejected the plaintiff therefrom and unlawfully detains the same from the plaintiff; and the plaintiff made due demand upon the defendant for the possession of said real estate and premises and does hereby renew such demand, which the defendant refused and still refuses to give, and the plaintiff claims the possession thereof, with the appurtenances, besides the cost of this suit.

B. F. LEIGHTON,
Attorney for Plaintiff.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff,
vs.
EDWARD M. WILLIS, Defendant. } At Law. No.—.

Service of a copy of the above declaration is this 5th day of October, 1894, acknowledged.

CALDERON CARLISLE,
Attorney for Defendant.

Statement of Fact, etc.

Filed November 17, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
vs.
EDWARD M. WILLIS. } At Law. No. 36903.

SAME
vs.
WILLIAM G. JOHNSON. } At Law. No. 36904.

The plaintiff and defendants in the above-entitled causes hereby mutually agree that the said causes may be tried together, and that the material facts in the said causes are as follows, to wit:

The plaintiff is a body corporate, organized and doing business under and by virtue of a special charter granted by the legislature of the State of Maine, and having its principal place of business in in the city of Bangor, in said State.

An exemplified copy of said charter is filed herewith, marked

"E. T. and B. Co., Exhibit No. 1," and is to be read and con-
5 sidered in connection herewith and as part hereof. The defendant William G. Johnson is sued as assignee of the American Ice Company, as hereinafter set out, and the defendant Edward M. Willis as the tenant or lessee of the said Johnson. The American Ice Company is a body corporate duly organized under the laws of the State of Maine and had, until the 14th day of October, 1893, its principal place of business at the said city of Bangor, in said State, since which time it has had no office.

That heretofore, to wit, on the second day of December, A. D. 1889, the said American Ice Company executed and delivered to the said trust company a certain deed, which was recorded in Liber No. 1439, folio 417 *et seq.*, one of the land records of said District, and a regularly certified copy of said deed as recorded is filed with this statement of fact, marked "E. T. and B. Co., Exhibit No. 2," and is made a part hereof as fully though incorporated herein *in hæc verba*. The original deed bears the impress of the corporate seal of the American Ice Company and of the Eastern Trust and Banking Company upon or near the names of said companies subscribed to said deed, and it is admitted that said seals were affixed to said deed at the time of or before the execution and delivery thereof and as required by the witnessing clause thereto, and that the recorder failed to note the same upon the record.

The bonds described in said deed were executed and delivered unto the said Eastern Trust and Banking Company, as recited in said deed, and were by the said Eastern Trust and Banking Company delivered to the parties entitled thereto, as required by the terms and provisions of said deed. That said bonds were taken by the parties to whom they were delivered for value in the regular course of business, before maturity, and are now held and owned by them or by their assigns or legal representatives, except as to the first instalment thereof, which fell due in December, A. D. 1892, and was paid, together with the interest then accrued and due on all of said bonds. The next -stalment of said bonded indebtedness, which became due in December, 1893, was not paid at maturity nor was the interest then falling due paid, nor have either of said sums or any part of them been since paid or satisfied in any manner. The parties holding said bonds have not nor have any of them waived their right to said payment in accordance with the tenor and effect of said bonds and of said deed of trust or mortgage. By the terms and provisions of said bonds and of the said deed of trust or mortgage the residue of said bonded indebtedness, to wit, the sum of $35,000, together with the accrued interest thereon, are now and were at the time of the commencement of this suit due and payable.

Thereafter, to wit, on or about the 13th day of October, A. D. 1893, the said American Ice Company, by an instrument of writing of that date, made and delivered in due form of law an assignment of all of its property of what kind soever for the benefit of its creditors unto the defendant William G. Johnson, which said deed of assignment was duly made of record in Book No. 1847, page 211

et seq., one of the land records of said District, a duly certified
6 copy of which is filed with this statement of fact, marked "E. T. and B. Co., Exhibit No. 3," and is to be read and considered in connection herewith and as part hereof so far as it may be material.

The said Johnson accepted said trust and entered upon the discharge thereof, in the course of which he, as such assignee, leased the hereinbefore-described real estate unto the defendant, Edward M. Willis. A copy of said lease is filed herewith, marked "E. T. and B. Co., Exhibit No. 4," and is to be read and considered in connection herewith and as part hereof.

After the default in the payment of said second instalment of bonds and of the interest on the bonded indebtedness, as aforesaid, had continued for the period of more than ninety days the said bondholders, or those holding more than fifty per cent. of the total face value thereof, directed the said trustee to proceed in the execution of said trust in accordance with the terms and provisions thereof, in pursuance of which the said trustee has instituted these proceedings to obtain possession of said property.

The said trustee caused a thirty days' notice to quit to be served upon each of said defendants. The notice to William G. Johnson was in the language following, to wit:

"SIR: You are hereby notified to remove from and quit the land and premises situate in the city of Washington, in the District of Columbia, described as follows, viz: All that piece or parcel of land opposite square two hundred and seventy (270), commencing for the same at the southeast corner of said square two hundred and seventy (270), thence southerly with the west line of Thirteenth street to the channel of the Potomac river; thence westerly with the said channel to a point opposite the southwest corner of said square; thence due north to the southwest corner of said square, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and fifty-five (255) feet one (1) inch to the place of beginning, together with the improvements thereon and the rights and privileges thereunto appertaining, which you now occupy as tenant by sufferance of the undersigned, in your capacity as assignee as aforesaid, at the end of thirty (30) days from the time of the serving of this notice upon you.

(Signed) EASTERN TRUST AND BANKING COMPANY,
A Corporation Duly Established under a Charter Granted by the State of Maine,
By B. F. LEIGHTON, *Its Attorney.*

The notice addressed to Edward M. Willis is the same in every particular except that the words "in your capacity as assignee as aforesaid" are omitted.

Copies of said notices are filed herewith, marked "E. T. and B. Co., Exhibits Nos. 5 and 6," and the same are to be read and considered as a part hereof. The said notices were duly served upon

the defendants on the 30th day of July, A. D. 1894. There-
7 after to wit, on the 17th day of September, 1894, the plaintiffs caused a seven days' summons to be issued by Lewis I. O'Neal, a justice of the peace in and for said District, in accordance with the provisions of the statute in such cases made and provided; and the defendants appeared therein and interposed pleas of title, the defendant Johnson pleading title in himself and the defendant Willis in the said Johnson, whereupon security was given as required by law and the causes were duly certified by the justice to this court for trial, as will appear by the pleadings and proceedings had and taken in said causes.

It is further admitted that after default had been made in the payment of said bonds and the interest thereon, as hereinafter stated, and in pursuance of the direction of the holders of said bonds as aforesaid and of the powers conferred upon and vested in it by said deed of trust or mortgage, the said trustee advertised said property for sale in accordance with the requirements of said deed of trust and exposed the same for sale at public auction in the said city of Bangor, State of Maine, on or about the 4th day of May, A. D. 1894. No sale took place at that time, but the sale was adjourned until September 8th, A. D. 1894, at the same place, at which sale a committee, acting for said bondholders, purchased the above-described real estate for their, the said bondholders', benefit.

The terms of said sale have not yet been complied with and no deed has been made to said purchasers, it being understood and agreed upon between the purchaser and the trustee at the time of said last-named sale that the said trustee should first obtain possession of said property.

Upon the pleadings and proceedings in said causes and the facts hereinbefore stated and admitted, it is by the respective parties to said causes stipulated and agreed that the same shall be, and they hereby are, submitted to the honorable justice holding this court for his determination without a jury, judgment to be rendered by him as to law and justice shall appertain, the right of excepting to the materiality or relevancy or competency of the facts above stated or any of them being reserved, as also the right of appeal.

In witness whereof the said plaintiff and defendant- have, by their respective attorneys, signed this agreement.

B. F. LEIGHTON,
Attorney for Plaintiff.
W. G. JOHNSON,
Attorney for Defendants.

8 E. T. & B. Co., EXHIBIT No. 1.

Filed November 17, 1894.

STATE OF MAINE.

In the year of our Lord one thousand eight hundred and eighty-seven.

An act to incorporate the Eastern Trust and Banking Company.

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

SECTION 1. Weston F. Milliken, Thomas J. Stewart, Fred. W. Hill, John Cassidy, David Bugbee, Eugene M. Hersey, John H. Dole, Sprague Adams, James Adams, Josiah C. Towle, William B. Dole, J. Albert Dole, William B. Snow, Julius Waterman, Charles E. Field, Eugene C. Nichols, Frank P. Wood, Jacob Sterns, George H. Grant, Ivory W. Coombs, John Ross, John McCann, Cornelius Murphy, David T. Sanders and Francis H. Clergue, or such of them as may by vote accept this charter, with their associates, successors and assigns, are hereby made a body corporate and politic, to be known as Eastern Trust and Banking Company and as such shall be possessed of all the powers, privileges and immunities, and subject to all the duties and obligations conferred on corporations by law, except as otherwise provided herein.

SECTION 2. The corporation hereby created shall be located at Bangor, Penobscot county, Maine, and may establish agencies in any part of this State.

SECTION 3. The purposes of said corporation and the business which it may perform, are; first, to receive on deposit, money, coin, bank notes, evidences of debt, accounts of individuals, companies, corporations, municipalities and States, allowing interest thereon, if agreed, or as the by-laws of said corporation may provide; second, to borrow money, to loan money on credits or real estate or personal security, and to negotiate loans and sales for others; to guarantee the payment of the principal and interest of all obligations secured by mortgages of real estate running to said Eastern Trust and Banking Company; to issue its own bonds or obligations based upon real or personal property conveyed to it, in trust to secure the payment of such bonds or obligations and the interest thereon; third, to hold for safe keeping, all kinds of personal or mixed property, and to act as agent for the owners thereof, and of real estate for the collection of income on the same, and for sale of same, and to act as agent for issuing, registering and countersigning certificates, bonds, stocks and all evidences of debt or ownership in property; fourth, to hold by grant, assignment, transfer, devise or bequest, any real or personal property, or trusts duly created, and to execute trusts of every description; fifth, to act as assignee,

9 receiver, guardian, executor and administrator, and no surety shall be necessary upon the bond of the corporation unless

the court or officer approving such bond shall require it; sixth, to hold and enjoy all such estates, real, personal and mixed, as may be obtained by the investment of its capital stock or any other moneys and funds that may come into its possession in the course of its business and dealings, and the same sell, grant, mortgage and dispose of, except as provided in section ten: seventh, to do in general, all the business that may lawfully be done by a trust or banking company.

SECTION 4. An administrator, assignee, guardian or trustee, any court of law or equity, including courts of probate and insolvency, officers and treasurers of towns, cities, counties and savings banks of the State of Maine, may deposit any moneys, bonds, stocks, evidences of debt or of ownership in property, or any personal property, with said corporation, and any of said courts may direct any person deriving authority from them, to so deposit the same.

SECTION 5. The capital stock of said corporation shall be one hundred thousand dollars, divided into shares of one hundred dollars each, with the right to increase said capital at any time, by vote of the shareholders, to any amount not exceeding one million of dollars. Said corporation shall not commence business until stock to the amount of one hundred thousand dollars shall have been subscribed for and paid in.

SECTION 6. The shareholders of this corporation shall be individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of said corporation to a sum equal to the amount of the par value of the shares owned by each, in addition to the amount invested in said shares.

SECTION 7. Said corporation, after beginning to receive deposits, shall at all times have on hand in lawful money, as a reserve, not less than twenty-five per cent. of the aggregate amount of its deposits, which are subject to withdrawal on demand; provided, that in lieu of lawful money, two-thirds of said twenty-five per cent. may consist of balances payable on demand, due from any national or State bank.

SECTION 8. The shares of said corporation shall be subject to taxation in the same manner and amount, as are the shares of national banks.

SECTION 9. Said corporation shall be subject to examination by the bank examiner, who shall visit it at least once in every year, and as much oftener as he may deem expedient. At such visits, he shall have free access to its vaults, books and papers, and shall thoroughly inspect and examine all the affairs of said corporation, and make such inquiries as may be necessary to ascertain its condition and ability to fulfill all its engagements. He shall preserve, in a permanent form, a full record of his proceedings, including a statement of the condition of said corporation. A copy of such statement shall be published by said corporation immediately after the annual examination of the same, in some newspaper published in Bangor.

SECTION 10. All property or money held in trust by this corporation shall constitute a special deposit, and the accounts

thereof, and of said trust department, shall be kept separate, and such funds and the investment or loans of them shall be especially appropriated to the security and payment of such deposits, and not be subject to any other liabilities of the corporation; and for the purpose of securing the observance of this proviso, said corporation shall have a trust department in which all business pertaining to such trust property, shall be kept separate and distinct from its general business.

SECTION 11. All the corporate powers of this corporation shall be exercised by a board of trustees, whose number and term of office shall be determined by vote of the shareholders at the first meeting held by the incorporators and at each annual meeting thereafter. The affairs and powers of the corporation may, at the option of the shareholders, be entrusted to an executive board of five members, to be, by vote of the shareholders, elected from the full board of trustees. A majority of said board shall reside in this State.

SECTION 12. This act shall take effect when approved.

In House of Representatives, March 8, 1887.

This bill, having had three several readings, passed to be enacted.

A. P. WISWELL,
Speaker pro Tem.

In Senate, March 9th, 1887.

This bill, having had two several readings, passed to be enacted.

SEBASTIAN S. MARBLE, *President.*

MARCH 10TH, 1887.

Approved.

JOSEPH R. BODWELL, *Governor.*

STATE OF MAINE,
OFFICE OF SECRETARY OF STATE.

I hereby certify that the paper to which this is attached is a true copy from the records of this office.

[SEAL.] In testimony whereof I have caused the seal of the State to be hereunto affixed.

Given under my hand, at Augusta, this nineteenth day of October, in the year of our Lord one thousand eight hundred and ninety-four, and in the one hundred and eighteenth year of the Independence of the United States of America.

S. J. CHADBOURNE,
Deputy Secretary of State.

11 E. T. & B. Co., EXHIBIT No. 2.

Filed November 17, 1894. Rec'd Jan. 13, 1890—10.15 a. m.

American Ice Company
to
Eastern Trust & Banking Co., Tr. } Trust Mortgage.

Liber No. 1439, folio 417 *et seq.* F. J. J.

This indenture made the second day of December, A. D. 1889, between American Ice Company, a corporation duly organized under the laws of the State of Maine, and located at Bangor in the county of Penobscot and State aforesaid, party of the first part, and the Eastern Trust and Banking Company, trustee, a corporation duly established under a charter granted by the State aforesaid, and located at Bangor aforesaid, hereinafter called the trust company, party of the second part, witnesseth,

That whereas said American Ice Company, at a meeting of its directors duly called and held on the 18th day of November, 1889, for the purpose as expressed in the call of providing for the issue of the first-mortgage bonds of the company to the amount and on the terms expressed in the vote copied below, the language of the proposed vote being embodied in the call, adopted the following vote: "That the president and secretary be authorized to make and execute a mortgage of all the property of the company including that to be purchased of E. M. Willis to any person or corporation as trustee to secure an issue of the coupon notes or bonds of the company to a total amount of forty thousand dollars ($40,000). Said notes or bonds and the interest thereon shall be of such denominations, and payable at such times and places and on such terms and conditions as the president and secretary may determine, the said officers are hereby authorized to do all things and execute all papers necessary for carrying out the purposes of this vote." And whereas in pursuance of said vote the American Ice Company acting by its president and secretary, has made its coupon notes or bonds numbered from one to one hundred and seventy-six inclusive, one hundred and twenty of the same being for one hundred dollars each, and fifty-six for the sum of five hundred dollars each, dated December 2nd, 1889, and payable in equal installments of five thousand dollars ($5,000) each in 3, 4, 5, 6, 7, 8, 9 and 10 years from the first day of December, 1889, with interest at the rate of six (6) per cent. per annum payable semi-annually on the first days of June and December in each year at the office of said Eastern Trust and Banking Company in said Bangor, according to the tenor of the coupons attached thereto, all of which bonds are now in the hands of the party of the second part to be authenticated by *b*a certificate signed by it as being secured by these presents, and are held by it for delivery to the parties respectively entitled thereto, the form of each bond, of the coupons, and of the trustee's certificate thereon being substantially as follows, viz:

12 $—. UNITED STATES OF AMERICA. No. —.

American Ice Company First-mortgage 6 per Cent. Bond. Organized under the Laws of Maine.

Authorized issue, $40,000.

American Ice Company organized under the laws of the State of Maine, and having places of business in the city of Bangor, in the county of Penobscot and State of Maine, and the city of Washington in the District of Columbia, promises to pay Eastern Trust and Banking Company or the bearer hereof the sum of — hundred dollars lawful money of the United States at the office of Eastern Trust and Banking Company in the city of Bangor, Maine in — years from the first day of December A. D. 1889, with interest on said sum at the rate of six (6) per cent. per annum, payable semi-annually on the first days of June and December in each year at the office of said Eastern Trust and Banking Company in said Bangor, according to the tenor of the coupons hereto attached upon the presentation and surrender of said coupons respectively. This bond is one of a series of one hundred and seventy-six bonds (176) fifty-six (56) of which are for five hundred dollars each and one hundred and twenty (120) for one hundred dollars each, amounting in the aggregate to forty thousand dollars, numbered respectively from one to one hundred and seventy-six both inclusive, all bearing even date herewith, executed and delivered in pursuance of a vote of the directors of said American Ice Company, duly authorized by the by-laws of said American Ice Company duly adopted on the eighteenth day of November 1889, authorizing the issue of said bonds and the execution and delivery of the mortgage hereinafter mentioned. Payment of this bond and of the coupons attached is secured in the manner and upon the terms therein stated by a first mortgage upon all the real estate wharves, ice-houses, stables, boilers, elevator and machinery situated in the town of Hampden in the county of Penobscot and State of Maine, and in the city of Washington, District of Columbia, bearing even date herewith, executed and delivered by it in pursuance of said vote to said Eastern Trust and Banking Company as trustee for the bondholders, which mortgage has been duly recorded in the registry of deeds for Penobscot county, Maine, and in the registry of land records for District of Columbia. Said mortgage is hereby referred to and the terms thereof made a part of this bond. This bond shall pass by delivery.

In testimony whereof, said American Ice Company has caused this bond to be signed and sealed in its name and behalf by its president and countersigned by its secretary, and the coupons hereto attached to be signed by its secretary the second day of December A. D. 1889.

AMERICAN ICE COMPANY.
—— ——, *Secretary.*
—— —— *President.*

On the back of the bond appears the following endorsement:

13 *Trustee's Certificate.*

The undersigned trustee, named in the within bond and in the mortgage therein referred to, certifies that said mortgage has been delivered to it as trustees and that this bond is one of the series of one hundred and seventy-six (176) bonds secured thereby.

EASTERN TRUST AND BANKING COMPANY,
By —— ——, *Trustee.*

No. —.

American Ice Company First-mortgage 6 % Bond.

Interest payable June 1st and December 1st at the office of Eastern Trust and Banking Company, Bangor, Maine.

All the coupons contain the following:

$—.

On the first day of ——, 18—, American Ice Company promises to pay the bearer — dollars on presentation of this coupon at the office of Eastern Trust and Banking Company, Bangor, Maine, being six months' interest on bond No. —.

Dated December 2nd, 1889.

CHAS. E. FIELD, *Secretary.*

Now then the party of the first part, in consideration of the premises and of the sum of one dollar paid by the party of the second part, receipt whereof is hereby anknowledged, and in order to secure due and punctual payment of said several bonds and of the interest thereon, has given, granted, bargained, sold, transferred and conveyed and does by these presents give, grant, bargain, sell, transfer and convey unto the party of the second part, trustee, as hereinafter provided and its successors in trust, with full power of succession to, and enjoyment of the franchises of the corporation, all its real estate, wharves, ice-houses, boarding-house, stables, boilers, elevator and machinery situated in the town of Hampden in said county of Penobscot and in the city of Washington in the District of Columbia, together with all and singular the privileges and appurtenances thereto belonging. It is understood that all the bonds authorized by the vote herein recited and secured by this instrument shall be delivered to the Eastern Trust and Banking Company as trustee, and by it certified to be of the seriers secured hereby and that all said bond- shall then be returned to and be at the disposition of said American Ice Company. The description of the real estate and rights owned by the American Ice Company which are her-in conveyed is as follows, viz: Two certain lots or parcels of land in Hampden in the county of Penobscot aforesaid bounded and described as follows: That portion of the Cyrus Emery farm which

lies between the Penobscot river and the new county road,
14 being all of said farm lying east of said road, the same measuring nine hundred and sixty (960) feet more or less on said road, and containing thirty (30) acres more or less; and being the same premises conveyed by trustees by said Cyrus Emery's estate by said deed recorded in Penobscot Registry of Deeds vol. 502 page 288, to which deeds as well as to a deed from Augustus J. Emery recorded in said Registry of Deeds vol. 530 page 98 reference is hereby had. A lot formerly a part of the homestead of John Harden described and bounded as follows, viz: Beginning at a stake, on the deviding line between land of said Harden and land formerly of the heirs of Cyrus Emery, thence with right angles with said dividing line twelve and one-half rods more or less to the dividing line between land of said Harden and land of Doddwell; thence on said dividing line to the Penobscot river; thence down said river to said dividing line between land of said Harden and land formerly of the heirs of Cyrus Emery; thence on said Emery's line to the place of beginning. Together with all the buildings and fixtures of the two said above-described parcels of land, being the same premises conveyed by the Penobscot River Ice Company to said American Ice Company by deed dated June 10th, 1889, and recorded in the Penobscot Registry of Deeds, Book 593, page 449. Also all that piece or parcel of land with the improvements thereon lying in the city of Washington, in the District of Columbia, and being opposite square 270 in said city and District, commencing for the same at the southeast corner of square numbered two hundred and seventy, running thence southerly with the west line of Thirteenth street to the channel of the Potomac river, thence westerly with the said channel to a point opposite the southwest corner of said square numbered two hundred and seventy, thence due north to the said southwest corner of said square two hundred and seventy, following the eastern line of what is alleged to be Thirteen-and-a-half street, thence with the southern line of said square two hundred and seventy, two hundred and fifty-five feet one inch to the place of beginning; together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand, either at law or in equity, or otherwise however, of the said parties of the first part of, in, to or out of the said piece or parcel of ground and premises. Being the same premises conveyed by E. M. Willis and another to said American Ice Company by indenture dated December second, 1889, and recorded in land records of the District of Columbia Book 1445 page 16. Together with all the rights and easements, appurtenant, privileges or options, in the matters of wharving or other riparian rights of any kind whatsoever which may hereafter be acquired by said American Ice Company by virtue of the covenants and agreements in said deed of said Willis & *al.* contained. To have and to hold the above-described property, real estate, rights, and franchises with all the privileges and appurtenances thereto belonging unto the party of the second part, its succes-

sors and assigns, to its and their own use and behoof forever,
15 but in trust nevertheless for the equal *pro rata* benefit and security of the holders of the above-mentioned bonds, at whatever period the same may be issued without any preference or priority of one bond over another and for the uses and purposes hereinafter declared.

Article 1. Until default shall be made in the payment of the principal or interest of said bond- or some of them, or in the maintenance of insurance, or in the payment of taxes or assessments as herein provided, or until default shall be made in respect to something by these presents required to be done by said party of the first part, the American Ice Company shall be permitted and suffered to possess, manage, develope, operate and enjoy the plant and property herein conveyed and intended so to be and to take and use the income, rents, issues and profits thereof in the same manner, to the same extent, and with the same effect as if this deed had not been made.

Article 2. If said American Ice Company shall well and faithfully pay the principal sum due on said bonds when the same become payable according to the tenor thereof, together with the interest accrued and due thereon, and shall pay all the coupons attached to said bond and each of them according to the tenor thereof on the presentation of the said coupons respectively and shall well and truly perform, according to the true intent and meaning hereof all the other things required by these presents to be done by said American Ice Company then these presents shall be void, but if default shall be made by said American Ice Company in the payment of said bonds or of any of them at the time they fall due and payable, or if said American Ice Company shall fail to pay said coupons or any of them according to the tenor thereof on the presentation and surrender of the same respectively, or if it shall fail faithfully to observe the requirements made of it by these presents and such default shall continue for the space of ninety days, then the whole amount of the principal of said bonds, together with all accrued and unpaid interest thereon (unless such default be waived by the holders of the majority of the bonds then outstanding as hereinafter provided) shall be deemed immediately due and payable; and it shall be lawful for the trustee to enter into or upon the premises and property hereby granted or intended so to be and to take possession of the whole or any part thereof and to sell and dispose of all and singular the premises, property, rights, interests and franchises hereby conveyed or mortgaged, or intended so to be, or such portion as the trustee may deem necessary at public auction in said Bangor upon such terms as to credit, partial credit and security for payment as it may think proper or expedient having first given public notice of the time and place of the sale or sales by advertisement printed not less than once a week for at least four successive weeks in one or more newspapers printed and published in said Bangor and also in Washington aforesaid. The trustee shall have the right to adjourn such sale or sales from time to time in its discretion giving reasonable notice of each adjournment and after so

adjourning to make the sale at the time and place to which
16 the same may be adjourned; and no other notice or demand whatsoever to or upon the party of the first part shall be necessary. The trustee is hereby further authorized and empowered in its own name or in the name of the American Ice Company to make, execute, acknowledge and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance of the property so sold; and any sale made as aforesaid shall be a perpetual bar both at law and in equity against the*w* American Ice Company and all persons claiming by, through, or under it from claiming the property, rights, interest and franchises so sold or any interest therein. And for the purposes aforesaid the party of the second part and its successors in the trust are hereby constituted irrevocably the attorney of said American Ice Company. Out of the proceeds arising from such sale or sales the trustee shall first defray the expenses thereof, together with its just and lawful charges for services and expenses, including reasonable allowance for attorney and counsel fees and also all advances and expenses reasonably incurred by the trustee in operating, maintaining, or managing the property or business of the American Ice Company while in possession and all payments made by said trustee for taxes, assessments, insurance and other proper charges upon said premises and property. The balance of said proceeds shall be paid over ratably to and amongst the parties holding said bonds and coupons so far as any be necessary to pay the amounts then due upon the same including the principal and interest*ed* computed to the time of making the payment; and if any of said proceeds then remain, the remainder shall be paid over to said American Ice Company or its assigns. It is hereby declared and agreed that the receipt of the trustee shall be a sufficient discharge to the purchaser or purchasers for his or their purchase-money; and that the bondholders or any number of them or any person in their behalf may purchase at any sale made as aforesaid.

Article 3. The foregoing provision for a sale under the power aforesaid is cumulative with the ordinary remedy of foreclosure by entry or suit therefor, and the trustee hereunder may upon default being made as aforesaid, institute and carry out proceedings to foreclose this mortgage or deed of trust by suit or otherwise in such manner as may be authorized by law for the foreclosure of mortgages of real estate. And the American Ice Company hereby waives any and all rights of sale or redemption now or hereafter provided by the statutes of Maine or of the United States.

Article 4. Before proceeding to foreclose this deed or mortgage whether by sale under said power or otherwise the trustee shall have *to* right first to exact from the bondholders reasonable indemnity against loss and liability that may be incurred by it in so doing and upon the tender by the bondholders or any of them of such reasonable indemnity, whether previously requested of them, or not, it shall be the duty of the trustee in case of any default continuing on the part of said American Ice Company and not waived as here-

inafter provided, to foreclose in such lawful manner as the trustee may deem best.

17 Article 5. No delay or omission by the trustee in exercising the rights and powers herein granted shall be held to exhaust or impair such rights and powers or be construed as a waiver thereof, but it is hereby mutually agreed that the holders of a majority in amount of the bonds at the time outstanding may by and instrument in writing at any time, whether before or after the institution of foreclosure proceedings, waive, or instruct the trustee to waive any default provided always that no such act on the part of the bondholders shall extend to or be taken to effect any subsequent default, or impair the rights resulting therefrom.

Article 6. The American Ice Company agrees at all times upon request to furnish the trustee a schedule showing with reasonable detail the items of the estate, property and other things covered by the lien hereof or intended so to be; and the trustee shall have the power from time to time to release from the lien of this deed any of the property when in its judgment other property of equal value is substituted therefor and subjected to the lien hereof so that such release shall not injure the security or rights of the bondholders.

Article 7. The American Ice Company hereby expressly covenants and agrees to pay any and all taxes, assessments, and governmental charges assessed or laid upon the property herein conveyed or intended so to be and also to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee in such amounts as shall reasonably protect all the insurable property payable in case of loss to the trustee as its interest may appear. In case of loss the insurance money may be applied by the trustee toward the renewal of, or additions to the property destroyed or injured, or at the option of the trustee the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid and of the interest which may at that time have accrued upon the principal and be unpaid, without discrimination or preference; and ratably to the aggregate amount of said unpaid principal and accrued and unpaid interest, rendering the surplus if any to the American Ice Company or to whomsoever may be, lawfully and equitably entitled to receive the same.

Article 8. The trustee shall not be liable for any neglect, mismanagement, or misfeasance or any of its or their agents, attorneys, or servants in relation to taking possession of, controlling, operating, managing, or selling the premises or property aforesaid when said agents and servants have been selected with reasonable care.

Article 9. The American Ice Company agrees hereafter from time to time during the existence of this trust and mortgage to make, execute, acknowledge, and deliver all such further instruments and conveyances as in the opinion of the legal counsel of the trustee may be necessary to facilitate the execution of said trust or

further to secure the rights and remedies of the holders of said bond.

Article 10. The word "trustee" as employed in this instrument shall be taken to mean the trustee hereunder for the time
18 being whether said party of the second part or its successor or successors in said trust.

Article 11. The party of the first part as the agent of the party of the second part shall forthwith cause this indenture to be recorded as a mortgage both of real estate and personal property as may be required by the laws of the State of Maine and of the District of Columbia, so as to preserve and protect the rights of the bondholders and all parties hereto.

In testimony whereof the said American Ice Company has caused these presents and a duplicate hereof to be signed in its name and behalf and its corporate seal to be affixed to this and said duplicate by Francis H. Clergue, its president and Charles E. Field, its secretary, and the said Eastern Trust and Banking Company has caused these presents and said duplicate to be signed in its name and behalf and its corporate seal to be affixed hereto and to said duplicate by George B. Cauney its secretary, the day and year first above written.

AMERICAN ICE COMPANY,
By FRANCIS H. CLERGUE, *President.*
CHAS. E. FIELD, *Secretary.*
EASTERN TRUST AND BANKING COMPANY,
By GEO. B. CAUNEY, *Sec't'y.*

Signed, sealed, & delivered in presence of—
J. R. MASON.

STATE OF MAINE, *Penobscot,* } ss:

DECEMBER 31ST, 1889.

I, John R. Mason, a notary public in and for the county aforesaid do hereby certify that Francis H. Clergue, president of the American Ice Company, and Charles E. Field, secretary of said company, who executed in behalf of said company a certain deed bearing date on the second day of December, A. D. 1889, and hereto annexed, personally appeared before me in said county, both being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be the free act and deed of themselves and of said corporation.

Given under my hand and notarial seal this thirty-first day of December, A. D. 1889.

[NOTARIAL SEAL.] JOHN R. MASON,
Notary Public.

STATE OF MAINE, *Penobscot,* } ss:

I, Charles F. Sweet, clerk of all the judicial courts in said county certify that John R. Mason, Esquire, is and was at the date of h

certificate an acting notary public in and for said county, duly commissioned and qualified to act as such, and that the signature to the paper annexed, purporting to be his, is genuine, and that
19 he is duly authorized and empowered by the laws of said State to administer oaths, to take depositions, acknowledgments of deeds, assignments, and powers of attorney, and that the annexed instrument is executed and acknowledged according to the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the seal of the supreme judicial court for said State this tenth day of January, in the year of our Lord one thousand eight hundred and ninety.

CHAS. T. SWEET, *Clerk.* [COURT SEAL.]

Indorsement.

Fee, $7.00.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1439, vol. 417 *et seq.*, one of the land records of the District of Columbia.

Office of the recorder of deeds, Washington, D. C., September 21, 1894.

[SEAL.] GEO. F. SCHAYER,
Dep. Recorder of Deeds.

Copy.

E. T. & B. Co., EXHIBIT No. 4.

Filed November 17, 1894.

This agreement, made this twenty-ninth day of January, A. D. 1894, by and between William G. Johnson, assignee of the American Ice Company, of the city of Washington, District of Columbia, of the first part, and Edward M. Willis, of the same place of the second part witnesseth:

That the said William G. Johnson, assignee as aforesaid, under and by virtue of the authority and direction of the supreme court of the District of Columbia, in its order this day passed in the suit of Charles E. Field *vs.* The American Ice Company and others, No. 15063 of the equity docket of said court, in consideration of the rents, covenants and agreements hereinafter mentioned and on the part of the said party of the second part to be paid, observed and performed, hath let and demised and doth by these presents let and demise unto the said party of the second part all that certain real estate, wharves and improvements in the city of Washington, District of Columbia, known as all the property of the American Ice Company lying southwest of Water streets opposite square numbered two hundred and seventy, with the ice-house and wharf situated thereon and the necessary tools and machinery for the discharging and storing of ice, together with the scales and office furniture for the term of one year, beginning therefor on the twenty-ninth day of January, A. D. 1894, and fully to be complete and ended on January 28th, 1895.

To have and to hold the same unto and to the use of the said party of the second part his executors and administrators, yielding and paying therefor monthly and on the last day of each and every month during the continuance of this agreement the monthly rent of one hundred and thirty dollars to the said party of the first part, his heirs, executors and administrators at his or their place of business No. 344 D street, northwest, Washington, D. C., or wher-soever the said office or place of business for the time being may be.

Provided always, and it is hereby expressly stipulated and agreed, that this lease and all rights of the parties hereunder shall cease, and determine in the event of the eviction by the lawful enforcement of the rights of the first-mortgage bondholders of the said American Ice Company or eviction by the lawful enforcements of the rights, if any, of the Government of the United States, or an actual sale under the direction of the court by said party of the first part of said property or any portion thereof.

And it is further covenanted and agreed that should the said monthly rent or any part thereof be and remain unpaid for and during the space of ten (10) days next after the day whereon the same ought to be paid by the terms hereof, although no demand shall have been made therefor, and which demand is hereby expressly waived, then the said party of the first part, his heirs, executors and administrators shall have the right to enter upon said premises and the party of the second part utterly to put out and expel without any notice of thirty days as provided in section 681 of the Revised Statutes of the United States relating to the District of Columbia or any other notice whatsoever; all notice whatsoever, being by the said party of the second part, hereby expressly waived, and this lease shall thereupon, at the option of the party of the first part cease and determine.

It is also hereby covenanted and agreed by the said party of the second part that he shall not assign this lease nor sublet the said premises without the written consent of the party of the first part had and obtained, and that he, the said party of the second part, will at all times during his continuance in the possession of the said premises acknowledge the title and defend the possession of the said party of the first part, his heirs, executors and administrators, and that he will not acquire or seek to acquire title thereto, nor acknowledge title thereto in any other person without first surrendering actual possession thereof to the party of the first part his heirs, executors and administrators, except by the written consent of the said party of the first part, his heirs, executors and administrators.

It is further covenanted and agreed that the said party of the second part shall keep the said premises in the same good condition and repair in which they now are, damage by fire, the elements or trespassers and ordinary wear and tear from reasonable and careful use of the same excepted.

It is further stipulated and agreed that the breach by the party of the second part of any of the covenants, agreements, stipulations

or provisions herein contained, shall give the party of the first part the same right of possession and determination of this lease without notice, as is provided in case of non-payment of rent, and no
21 such breach shall be treated as waived unless expressly so waived in writing, and no waiver of one breach shall operate as a waiver of any other breach.

In testimony whereof, the said party of the first part, as assignee, as aforesaid, and the party of the second part, have hereunto set their hands and seals on the day and year first hereinbefore written, in duplicate.

(Signed) ——— ———. [SEAL.]
EDWARD M. WILLIS. [SEAL.]

WEDNESDAY, *December* 19, 1894.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

EASTERN TRUST AND BANKING CO., Plaintiff, } At Law. No. 36903,
v. Appeals 40.
EDWARD M. WILLIS, Defendant.

And now comes here the plaintiff, by its attorney, Mr. B. F. Leighton, and the defendant, by his attorney, Mr. W. G. Johnson, and submit this case to the court upon an agreed statement of facts, and, the same having been heard and fully understood, the court finds the matters of difference between the parties in favor of the defendant; therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day and recover against said plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof.

WEDNESDAY, *December* 19, 1894.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

EASTERN TRUST AND BANKING CO., Plaintiff, } At Law. No. 36904,
v. Appeals 41.
WILLIAM G. JOHNSON, Assignee, Defendant.

And now comes here the plaintiff, by its attorney, Mr. B. F. Leighton, and the defendant, by his attorney, Mr. W. G. Johnson, and submit this case to the court upon an agreed statement of facts, and, the same having been heard and fully understood, the court finds the matters of difference between the parties in favor of the defendant; therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day and recover against said plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof.

22 *Notice of Appeal.*

Filed December 22, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO.
vs.
EDWARD M. WILLIS, Defendant. } At Law. No. 36903.

SAME
vs.
WM. G. JOHNSON, Assignee, Def't. } At Law. No. 36904.

The plaintiff appeals from the judgment rendered against it in the above-entitled causes to the Court of Appeals of the District of Columbia.

B. F. LEIGHTON.
Attorney for Plaintiff.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
vs.
EDWARD M. WILLIS
and
SAME
vs.
WILLIAM G. JOHNSON, Assignee. } At Law. Nos. 36903 and 36904.

The President of the United States to Edward M. Willis and William G. Johnson, assignee, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 22 day of December, 1894, wherein The "Eastern Trust and Banking Company" is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 22 day of December, in the year of our Lord one thousand eight hundred and ninety-four.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

23 Service of the above citation accepted this 24 day of December, 1894.

WM. G. JOHNSON,
Attorney for Appellee.

(Endorsed:) Nos. 36903, 36904. Law. Eastern Trust and Banking Company *vs.* Edward M. Willis and Wm. G. Johnson, assignee Citation. Issued Dec. 22, 1894. Served cop- of the within citation on —— ——, —— ——, marshal. B. F. Leighton, attorney for appellant.

Opinion.

Filed December 29, 1894.

EASTERN TRUST & BANKING CO. *vs.* EDWARD M. WILLIS. } Law. No. 36903.

SAME *vs.* WILLIAM G. JOHNSON. } Law. No. 36904.

These cases are identical in fact, save as to the property involved, and differ as to defendants. They have been submitted upon an agreed statement of facts, applicable to and filed in each case, for the judgment of the court without a jury. They were instituted under what is known as the landlord & tenant act, to recover possession of the realty described in the proceedings, before a justice of the peace, and were certified to this court by the justice upon a plea of title.

In each case the pl'ff claims a fee-simple by the declaration filed in compliance with the rule of court.

By the agreed statement of facts it appears that the rights of the plaintiff are fixed and determined by a deed of trust from the American Ice Co., a copy of which is filed as an exhibit with the statement.

The deed of trust conveys the property in question to the pl'ff to secure the payment of certain bonds described therein, with accruing interest. By it it is provided that the American Ice Co. shall be permitted and suffered to possess, manage, &c., and to take and use the income, rents, &c., until default be made in the payment of the principal or interest of the bonds. It is also provided that upon default made, &c., it shall be lawful for the trustee to enter into the premises & to take possession of the whole or any part thereof, and to sell & dispose of all or such portion as the trustee may deem necessary, at public auction, in Bangor, upon terms of sale prescribed.

The statement of facts shows that default was made in the payment of the debt secured by the trust, and that the property in question was advertised for sale by the trustee and was sold Sept.

4, 1894, the purchasers being a committee acting for the bond-
24 holders; that the terms of sale have not been complied with, because it had been agreed between the purchasers and trustee that the latter should first obtain possession of the property; that these actions were instituted pursuant to such agreement.

One of the objections urged by the defendants to maintaining these actions is that the pl'ff is a foreign corporation authorized by its charter to conduct its business solely within the State of Maine, and that under the policy of the laws in force in the District of Columbia corporations organized therein were not permitted to exercise the powers of trustee. The charter of the pl'ff, which has been put in evidence, while not containing express authority to transact business out of the State, does not prohibit it, neither did any law in force in the District of Columbia, nor any public policy deduced from general legislation, nor any settled adjudications of the highest courts of this District prohibit the exercise of such powers by a foreign corporation within its limits. Under these circumstances, in harmony with the general law of comity among the States, a foreign corporation may exercise its powers in the District of Columbia.

Bank of Augusta *v.* Earle, 13 Pet., 519.
Runyon *v.* Lessee of Coster *et al.*, 14 Pet., 122.
Cowell *v.* Colo. Springs Co., 100 U. S., 55.
Christian Union *v.* Fount, 101 U. S., 352.

It is also urged as matter of defence that the relation of landlord and tenant did not exist between the pl'ff and def'ts, and that therefore the law did not authorize these actions and the justice of the peace had no jurisdiction of the cause of action.

The Court of Appeals of this District has recently decided that the act of Congress of July 4, 1864, entitled "An act to regulate proceedings in cases between landlord and tenants in the District of Columbia," applied to the case of a purchaser at a sale made by a trustee under an ordinary deed of trust of land as security for debt and grantee of such trustee against the grantor in such deed of trust in possession. That court held that the reservation in the deed of trust of the right of possession to the grantor until default made in the payment of the debt secured operated as *are* demise by the trustee (grantee) to the grantor, and created the relation of landlord & tenant between those parties; that the grantee of the trustee was vested with his rights to the possession and might maintain the action.

Laring *v.* Bartlett, Law Rep., June 21, '94.

In the case of Luchs *v.* Jones, 1 MacA., 345, the general term dismissed the appeal for want of jurisdiction, but the justice delivering the opinion of the court held that under like circumstances the grantor in possession after sale made and deed delivered by the trustee to the purchaser became, by operation of law, tenant by sufferance of the purchaser, & that the landlord & tenant act of July 4, 1864, did not require that the relation of the landlord &

tenant should exist by the convention of the parties in order to give jurisdiction.

25 That decision has never been regarded as authority, and for nearly twenty years this court, both in special & general term, has uniformly held that unless the conventional relations of landlord & tenant existed between the parties a justice of the peace under that act has no jurisdiction of a question of disputed possession, and it has so ruled in cases like that of Luchs & Jones.

See Jennings & Webb, 20 D. C., 317.

Whether the reasoning of the Court of Appeals be approved or not, its conclusion is authoritative with this court, and to me appears to settle the question of the jurisdiction of the justice of the peace in this case, notwithstanding the fact that in the cases at bar the controversy is between the trustee and the grantor in the trust deed, while the case adjudicated was between the purchaser from the trustee and the grantor in the trust deed.

It is further urged in defence that inasmuch as it appears by the agreed statement of facts that the trustee has executed the trust power to the extent of making the sale and has entered into an agreement with the purchasers to obtain possession for them that these actions cannot be maintained.

Whether the deed of trust contemplates the possession of the trust property by the trustee for the purposes of management upon default made in the payment of the debt need not be determined, for the trustee has not assumed to exercise such power. It does in terms authorize the trustee to take possession of the property and to sell such portion as it may deem necessary upon default made by the debtor. Such possession is authorized in aid of a sale to be made by the trustee. The power is to take possession and sell. The trust deed also unquestionably confers authority upon the trustee to sell without first taking possession. This power the trustee has exercised; it has made sale.

The right of the purchaser will be perfected upon the execution & delivery of a deed by the trustee, and that is the sole remaining function to be performed by the trustee under the power of sale. No power is given it to take or acquire possession after sale made at the instance or for the convenience of the purchaser. Its powers are limited to those declared in the trust deed. Those powers cannot be enlarged or added to by subsequent convention between it and the purchaser. It is not indicated that possession is sought in its own right, but at the instance of and in order that when acquired it may be turned over forthwith to the purchaser.

It has the title, for it has not yet conveyed, but, under existing circumstances, it has neither the right of property nor the right of possession. These actions cannot be maintained and judgment must be for the defendant in each case.

1895, January 5.—$50.00 deposited in each case in lieu of bond for appeal.

26 *Stipulation.*

Filed January 7, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO. *vs.* EDWARD M. WILLIS. } At Law. No. 36903.

SAME *vs.* WILLIAM G. JOHNSON, Assignee. } At Law. No. 36904.

The parties to the above-entitled causes, by their respective attorneys, hereby stipulate and agree that the record on appeal to the Court of Appeals of the District of Columbia from the judgment rendered in said causes shall consist of the following, to wit:

1. The complaint before the justice of the peace in No. 36903, the plea thereto, and the declaration filed in said cause. (The complaint, plea, and declaration are the same in No. 36904, the name of the defendant being changed, except as appears in the agreed statement of facts, and are to be considered as if set out *in extenso* on the record.)
2. The agreed statement of facts.
3. The charter of the plaintiff. (Exhibit "E. T. & B. Co. No. 1.")
4. The mortgage or deed of trust in full. (" " " No. 2.)
5. The lease. (" " " No. 4.)
6. And the opinion of the court. (The assignment referred to in the agreed statement of facts was made under the act of Congress approved May 24, 1893.)

B. F. LEIGHTON,
Attorney for Plaintiff.
WM. G. JOHNSON,
Attorney for Defendants.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, are true copies of the originals in causes numbered 36903 and 36904, wherein The Eastern Trust and Banking Co. is plaintiff and Edward M. Willis and Wm. G. Johnson are the respective defendants, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24th day of January, A. D. 1895.

JOHN R. YOUNG, *Clerk.*

27 Endorsed on cover: District of Columbia supreme court. No. 425. The "Eastern Trust and Banking Company," appellant, *vs.* Edward M. Willis and William G. Johnson, assignee. Court of Appeals, District of Columbia. Filed Jan. 28, 1895. Robert Willett, clerk.

WEDNESDAY, *April 10th, A. D.* 1895.

THE EASTERN TRUST AND BANKING COMPANY, Appellant,
vs.
EDWARD M. WILLIS and WILLIAM G. JOHNSON, Assignee. } No. 425.

The argument in the above-entitled cause was commenced by Mr. B. F. Leighton, attorney for the appellant, and was continued by Mr. Wm. G. Johnson, attorney for the appellees, and was concluded by Mr. B. F. Leighton, attorney for the appellant.

THE EASTERN TRUST AND BANKING COMPANY, Appellant,
vs.
EDWARD M. WILLIS and WILLIAM G. JOHNSON, Assignee. } No. 425.

Opinion of court per Mr. Justice SHEPARD:

The appellant is a corporation created by act of legislature of the State of Maine, and is fully empowered to receive conveyances in trust and to perform all the duties of trustees.

The American Ice Company is also a corporation of the State of Maine, having its principal office in said State. It owned property in Maine and also certain real estate in the District of Columbia, used in carrying on its business in selling ice in the city of Washington.

To secure a regular issue of $40,000 of bonds, the American Ice Company, on December 2, 1889, conveyed to the Eastern Trust and Banking Company, aforesaid, all of its real and personal property in Maine, and also the lots in controversy, situated in this District, in trust to secure the payment of said bonds.

The trust deed contains the apt words of conveyance usual in such instruments. Right of possession is reserved to the grantor until default in payment of interest, taxes, &c. But it is also expressly stipulated that in case of default in the payment of any interest coupon or coupons, and the continuance thereof for the space of ninety days, the entire debt shall become immediately due and payable, and that "It shall be lawful for the trustee to enter upon the premises and take possession of the whole or any part thereof, and to sell and dispose of all and singular the premises, property, &c., &c., or such portion as the trustee may deem necessary, at public auction, in Bangor, upon such terms as to credit, partial credit and security for payment as it may think proper or expedient, having first given public notice," &c. It is further stipulated that the provision for sale is to be cumulative with the ordinary remedy of foreclosure in equity.

28 The bonds were purchased by different persons for value received, and are still held by them. Default was made in

the payment of interest due December, 1893, and not having been waived, the principal of the bonds became due and payable.

On October 13, 1894, the American Ice Company made an assignment for the benefit of its creditors to William G. Johnson, assignee. The assignee accepted the trust, took possession of the lots in Washington, and leased them to Edward M. Wills.

The bondholders, in pursuance of the terms of the trust deed, directed the trustee to proceed with the execution of the trust. The trustee advertised all of the property for sale at Bangor, in accordance with the terms of the instrument, on May 4, 1894, but adjourned the same to September 8. A committee of bondholders made a bid for the property, the terms of which do not appear, and it was declared sold to them, upon condition that the same should not be completed or title passed until the trustee should first obtain possession of the property.

On July 30, 1894, the trustee served a written notice upon both Johnson, assignee, and his tenant Willis to remove from the premises at the end of thirty days. They refused to surrender possession, and on September 17, 1894, a proceeding was instituted against them by the appellant before a justice of the peace under the landlord and tenant act. Defendants appeared and interposed pleas of title; whereupon, as required by law, the case was certified by the justice of the peace to the supreme court of the District for trial. In said court appellant filed a declaration, upon which issue was duly joined.

Trial by jury was waived, and the case was submitted to the court upon an agreed statement of facts substantially set forth above. The defences made in the court below were: 1. That the action could not be maintained under the landlord and tenant act. 2. That the deed in trust was not executed or certified to so as to be legally registered in the District of Columbia. 3. That the appellant was not competent to take and execute the trusts sought to be created. 4. That the trust had been executed by sale before the institution of the suit, and the right to possession had passed from the trustee to the purchasers. The court overruled all these defences but the last one, and rendered judgment thereon for the defendants, from which this appeal has been prosecuted.

1. The appellees renew in this court, under the agreed statement of facts, the defences made below, save that denying the right of the trustee to maintain the special possessory action provided in the statute (R. S. D. C., sec. 684).

That question has been settled by the decision in Loring *v.* Bartlett, 22 Wash. Law Rep., 398, wherein it was held by this court that purchasers claiming under a sale made by trustees, in accordance with the provisions of an ordinary deed of trust, could maintain the action as provided in that statute.

2. It is unnecessary to pass upon the regularity of the certificate of the clerk of Penobscot county, Maine, to the official character of the notary public of that State, who certified to the acknowl-
29 edgment of the execution of the trust deed, or upon the validity of the record of that instrument in the District of Colum-

bia. The instrument was formally executed by the grantor and the grantee with their respective corporate seals and regularly delivered to the latter, who held it in the execution of the trust. Neither acknowledgment for record, nor record, were necessary to pass the title, or to protect the rights of the beneficiaries of the trust, as against an assignee for the benefit of creditors. Colbert *v.* Baetjer, 22 Wash. Law Rep., 763.

3. The objection that the appellant had no power to take under the conveyance, or to execute the trusts created thereby, is without merit. It was incorporated by special act of the legislature of Maine, and its domicile is in that State. The terms of the charter are ample to cover all the powers that it may exercise under said trust deed, and there is nothing therein to indicate that its corporate powers can only be exercised within the limits of the State of its creation. Appellant had the undoubted right, in so far as its act of incorporation is concerned, to do business in the District of Columbia, to accept trusts to be performed therein, and to sue in its courts. Bank of Augusta *v.* Earle, 13 Pet., 519. The mere fact that the laws prevailing in the District of Columbia, at that time, did not authorize the organization of corporations with the same powers that had been conferred upon appellant by the laws of Maine, is not sufficient to prevent it from the exercise of its powers in said District. A settled policy of prohibition is not to be inferred from the mere absence of legislation upon the subject. This is the well-established doctrine of the Supreme Court of the United States. Cowell *v.* Springs Co., 100 U. S., 55, 59. In that case, it was said: "If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law." See, also, Christian Union *v.* Yount, 101 U. S., 352, 356; Taylor on Corporations, sec. 384, and cases cited.

4. The judgment of the court of which appellant complains proceeds upon the ground that appellant, in the execution of the trust, actually sold the property in controversy before commencing this proceeding; that its powers became exhausted thereby, and that the title and right to the property must be considered as having passed to the bidders at said sale notwithstanding the conveyance had not been executed and delivered. This is a proceeding at law where recovery must be had upon the legal title; still it is not necessary to determine what weight should be given to that point had there been a regular and binding sale by the trustee, lacking completion only in the execution and delivery of the evidence of title.

Passing by the question, which has not been argued, whether a valid sale could have been made under the trust deed, in Maine, of land situated in the District of Columbia, we find in the statement of facts, that the offer for sale was made upon condition that
30 the trustee should first obtain the possession of the property

when only it would be perfected. It is very doubtful, to say the least, if a valid sale could be made upon such condition. If it could not, however, the effect of the attempt would be to avoid the sale and not the condition. Under any view that might be taken, the trustee could not compel the purchaser to accept the conveyance and pay the purchase-money, without the performance of the condition, or the waiver thereof by the purchaser.

Clearly, then, the trust has not been executed, the title has not passed out of the trustee, and the right of possession remains in it still.

For the reason given, the judgment must be reversed, with costs to the appellant, and the cause remanded, with direction to render judgment for it upon the agreed statement of facts, in conformity with this opinion. It is so ordered.

MONDAY, *June 3rd, A. D.* 1895.

THE EASTERN TRUST AND BANKING COMPANY, Appellant, *vs.* EDWARD M. WILLIS and WILLIAM G. JOHNSON, Assignee. } No. 425. April Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said supreme court with directions to render judgment for the appellant upon the agreed statement of facts, in conformity with the opinion of this court.

Per MR. JUSTICE SHEPARD.

June 3, 1895.

MONDAY, *June 17th, A. D.* 1885.

THE EASTERN TRUST AND BANKING COMPANY, Appellant, *vs.* EDWARD M. WILLIS and WILLIAM G. JOHNSON, Assignee. } No. 425.

On motion of Mr. C. Carlisle, attorney for the appellees in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed, on giving bond in the sum of seven thousand dollars.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before

you or some of you, between The Eastern Trust and Banking Company, appellant, and Edward M. Willis and William G. Johnson, assignee, appellees, a manifest error hath happened, to the great damage of the said appellees, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

To The Eastern Trust and Banking Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Edward M. Willis and William G. Johnson, assignee, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 18th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

32 JUNE 18, 1895.

Service hereof this day accepted.

B. F. LEIGHTON,
For Appellees.

Know all men by these presents that we, Edward M. Willis and William G. Johnson, as principals, and Augustus Burgdorf, as surety, are held and firmly bound unto Eastern Trust and Banking Company in the full and just sum of seven thousand dollars,

to be paid to the said Eastern Trust and Banking Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Eastern Trust and Banking Company and the said Edward M. Willis and William G. Johnson, a judgment was rendered against the said Willis and Johnson, and the said Willis and Johnson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Eastern Trust and Banking Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Willis and Johnson shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. G. JOHNSON. [SEAL.]
AUGUSTUS BURGDORF. [SEAL.]
EDWARD M. WILLIS. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

Approved by—
R. H. ALVEY,
Ch. Justice.

(Endorsed:) No. 425. The Eastern Trust and Banking Company, appellant, *vs.* Edward M. Willis *et al.* Bond on appeal to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed June 18, 1895. Robert Willett, clerk.

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Eastern Trust and Banking Company is appellant and Edward M. Willis and William G. Johnson, assignee, are appellees, which suit was removed into the said Court of Appeals by virtue of an appeal from the supreme court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said

Court of Appeals and removed into the Supreme Court of the
34 United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

35 [Endorsed:] Supreme Court of the United States. No. 817, October term, 1896. Edward M. Willis *et al.*, *vs.* The Eastern Trust & Banking Co. Writ of certiorari.

36 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 32, inclusive, contain a true and complete transcript of the record and all proceedings had in said Court of Appeals in the case of The Eastern Trust and Banking Company, appellant, *vs.* Edward M. Willis and William G. Johnson, assignee, No. 425, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 2d day of June, A. D. 1897.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

37 Endorsed: Case No. 16,596. Supreme Court U. S., October term, 1897. Term No., 383. Edward M. Willis *et al.*, petitioners, *vs.* The Eastern Trust & Banking Co. Writ of certiorari and return. Filed June 7, 1897.

No. 383.

Brief of Carlisle & Johnson for Petitioners.

Filed Dec 7th, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 383.

EDWARD M. WILLIS AND WILLIAM G. JOHNSON,
Assignees, Petitioners.

vs.

THE EASTERN TRUST AND BANKING CO.
Respondent.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR PETITIONERS.

CALDERON CARLISLE,
WM. G. JOHNSON,
For Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 383.

EDWARD M. WILLIS AND WILLIAM G. JOHNSON,
ASSIGNEE, PETITIONERS.

vs.

THE EASTERN TRUST AND BANKING CO.,
RESPONDENT.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR PETITIONERS.

This cause is brought here by a writ of *certiorari* (Rec. 32) from this court to the Court of Appeals of the District of Columbia to review the judgment of the latter court (Rec. 30). The case had been brought here by writ of error and was heard at the last term but the writ of error was dismissed for want of jurisdiction.

Willis *vs.* Eastern Trust & Banking Co., 167 U. S. 76.

By the order of this court passed May 24, 1897, the cause was advanced to be submitted on printed briefs to be filed on or before the second Monday of this term and in obedience to that order this brief is filed on behalf of the petitioners.

The proceeding by which this litigation was begun was an attempt by a Maine Trust Company, not authorized by its charter or by Congress to do business in the District of Columbia, to enforce a deed of trust as to real property in

this District, as against an assignee for the benefit of all creditors, including those secured by the deed of trust, not by appropriate proceedings in equity, but before a justice of the peace, a court of limited and special jurisdiction, and by a limited and special statutory proceeding, viz.: under the Landlord and Tenant Law.

STATEMENT OF THE CASE.

The respondent is a corporation created by a special charter from the Legislature of the State of Maine (Rec. 8. 10), and claims under a deed of trust in the nature of a mortgage to secure bonds in the amount of forty thousand dollars conveying real property in the State of Maine and in the city of Washington (Rec. 11, 19).

The proceeding which this writ brings up for review originated before a justice of the peace in this District upon the allegation that the petitioners were tenants by sufferance of the respondent, whose tenancy and estate in the land had been determined by the service of a thirty days' notice to quit (Rec. 1, 2).

The property involved, which is located in the city of Washington, as also certain property in Maine, is claimed to have been sold by the respondent, as trustee, by a public auction in the city of Bangor, Maine (Rec. 7).

To whom the property was sold, for what price, and upon what terms nowhere appears.

It is readily admitted on behalf of the assignee petitioner here that whatever the legal infirmities of the Maine Trust Company in regard to this trust in the District of Columbia, the said company and the bondholders secured have the fullest right to the protection of a court of equity, to which tribunal the petitioner is amenable as to his own trust, and any other affecting his rights or the property assigned, but the contentions of the assignee petitioner are:

I. That the Maine Trust Company cannot in any court of law in the District of Columbia insist upon a legal right to enforce the deed of trust—

(*a*) because its charter confined the operations of the company to the State of Maine;

(*b*) because the policy of the laws of Congress relating to the District of Columbia, did not, at the date of the deed, permit the acceptance by a foreign corporation of the trust;

(*c*) because the policy of the laws of Congress relating to the District of Columbia did not, at the date of the attempted execution of the trust, permit such execution by a Maine Trust Company which has not complied with the conditions required by Congress.

II. The relation of landlord and tenant did not exist between the parties, and for that reason the justice of the peace had no jurisdiction of the particular proceeding chosen.

The petitioner, Johnson, assignee of the American Ice Company, the grantor of the respondent, claims the title to the property by virtue of the deed of assignment to him for the benefit of creditors (Rec. 5).

Under the deed of assignment and under the law authorizing its execution (act of February 24, 1893, 27 Stat., p. 474), he has the duty of protecting all the creditors of the American Ice Company, both resident and nonresident, secured and unsecured, and believing this to be an attempt by some of the bondholders to sacrifice the property and secure it for themselves to the exclusion of other creditors, deems it to be his duty to resist such attempt.

It is not denied that the bondholders have an equitable lien for the security of their bonds which they can properly enforce in the courts of this District as the first lien on the property, but it is denied that the respondent has the legal title to said property, or the right of possession thereof.

The respondent claims to have sold the property in pursuance of the mortgage because of default in the payment of the bonds and that as part of the terms of sale the respondent agreed to secure possession of the property for the purchaser (Rec. 7).

By the second article of the deed of trust under which respondent claims (Rec., pp. 15, 16), the trustee is authorized to sell the land upon default, and to make a valid conveyance thereof to the purchaser, either in its own name or in the name of its grantor; and it is further provided (Rec., p. 16) that—

> "ANY SALE made as aforesaid shall be a PERPETUAL BAR *both at law and in equity*, against the American Ice Company, and all persons claiming by, through, or under it from claiming the property, rights, interests and franchises so SOLD *or any interest therein*."

The third article (Rec. 16) contains a waiver of the right to redeem under any existing or future laws of the United States. By the same article the right to the ordinary remedy by judicial proceedings for foreclosure is expressly secured (Rec. 16).

When the proceedings were instituted before the justice of the peace, the petitioners interposed a plea of title in accordance with the provisions of the statute and the rules of court (Rec. 2, 3), and the cause being certified to the Supreme Court of the District of Columbia, judgment was entered for the petitioners (Rec. 21), which judgment was reversed by the Court of Appeals (Rec. 30) and a writ of error sued out.

As above stated this writ of error was dismissed for want of jurisdiction after argument on the merits at the last term, but the court deemed the cause of sufficient importance to warrant bringing it up by this present writ of *certiorari* unembarrassed by any question of jurisdiction.

ASSIGNMENTS OF ERROR.

The court below erred—

1. In holding that the Maine corporation was legally competent to execute the trust in the District of Columbia by any proceedings at law.

2. In holding that the terms of the deed of trust constituted the relation of landlord and tenant between the Maine Company and its grantor within the true intent and meaning of the laws in the District of Columbia.

3. In holding that the justice of the peace had jurisdiction of the proceeding brought by the Maine Company.

4. In holding that respondent was entitled to judgment.

5. In not giving judgment for the petitioners.

ARGUMENT.

The deed of trust in this case undoubtedly constituted a valid equitable first lien to secure whatever was due to the bondholders, but the Maine Trust Company, the respondent had no legal and competent authority actively to execute the trusts in this District.

I.

The Maine Company was Legally Incompetent Actively to Execute Trusts in this District.

This deed was executed December 31, 1889 (Rec. 18), and recorded here January 13, 1890 (Rec. 11). At that time there was no law in force here permitting corporations of this character to be created or to act in this District.

Counsel are not unmindful of the ruling of this court in Christian Union *vs.* Yount, 101 U. S. 352, and the cases there referred to, but it is respectfully submitted that this corporation is not within the principles of that case.

By the terms of the charter creating the respondent certain limitations were imposed which are utterly inconsistent with its exercise of the functions here attempted. A corporation, while a legal entity, can do no personal act, but must always act through agents.

By the second clause of the charter it is provided:

> "Section 2. The corporation hereby created shall be located at Bangor, Penobscot County, Maine, and may establish agencies *in any part of this State*" (Rec. 8).

Expressio unius exclusio alterius; and besides the purpose and importance of this limitation is accentuated by the reservations of the ninth section (Rec. 9), specially providing for visitation by the State's officer.

The laws of the United States contemplate that all foreign corporations doing business in this District shall have agencies here to answer the process of the courts of this District, as they would otherwise be wholly irresponsible.

By the eleventh section of the Act of Congress of February 22, 1867 (14 St. 404), now Section 790 of the Revised Statutes relating to this District, it is provided that:

> "In actions against foreign corporations doing business in the District, all processes may be served on the agent of such corporation or person conducting its business, or, in case he is absent and cannot be found, by leaving a copy at the principal place of business in the District, and such service shall be effectual to bring the corporation before the court."

It is clear from this that Congress did not intend that foreign corporations should carry on business here without being amenable to the courts of the District. And, as this corporation, by the terms of its charter, was precluded from having offices or agencies outside of the State it was expressly disabled from meeting the requirements of the laws in force in this District.

Moreover, when Congress did, for the first time, by the Act of October 1, 1890 (26 St. 625–632), authorize corpora-

tions of this character to be formed and to do business in this District, it imposed numerous restrictions and requirements not found in the charter of the respondent, indicating the purposes and policy of Congress in this District upon that subject.

The act further imposes specific restrictions upon foreign corporations as a condition precedent to their right to exercise any of the functions attempted to be exercised by the respondent here.

The eleventh section of that act provides:

> "That any safe deposit company, *trust company*, surety or guaranty company, or title insurance company, now incorporated and operating under the laws of the United States or of the District of Columbia, or any of the States, and now doing business in said District, may avail itself of the provisions of this act on filing in the office of the Recorder of Deeds of the District of Columbia, or with the Comptroller of the Currency, a certificate of its intention to do so, which certificate shall specify which one of the three classes of business set out in section one it will carry on, and shall be verified by the oath of its president to the effect that it has in every respect complied with the requirements of existing law, *especially with the provisions of this act*; that its capital stock is paid in as provided in section twenty-one of this act and is not impaired, and *thereafter* such company may exercise all powers and perform all duties authorized by any one of the subdivisions of section one of this act *in addition* to the powers *now lawfully exercised by such company*" (26 St. 628).

And in the fifth section there is the following proviso:

> " . . . Provided, however, that no corporation created and organized under the provisions hereof, or availing itself of the provisions hereof as provided in section eleven, shall be authorized *to transact the business of a trust company*, OR ANY BUSINESS OF A FIDUCIARY CHARACTER, until it shall have filed with the Comptroller of the Currency a copy of

> its certificate of organization and charter, and shall have obtained from him and filed the same for record with the said Recorder of Deeds a certificate that the capital stock of said company has been paid in and the deposit of securities made with said comptroller in the manner and to the extent required by this act" (Ib. 626).

It is not pretended that the respondent before its attempted foreclosure of the deed of trust and its proceedings here in this District, complied or attempted to comply with any of the provisions of the Act of 1890, or that it ever had an agent or place of business here as contemplated by section 790 of the revision above quoted.

It cannot be objected that the Act of Congress of October 1, 1890, could not apply because this deed to the respondent was executed in December, 1889, for by taking a conveyance to itself of a trust to be executed here, a foreign corporation could not defeat the power of Congress *to regulate the manner and conditions of its exercising its functions in this District.*

The right of a foreign corporation to operate at all in this District is subject to the will of Congress, which can at any time regulate or prohibit altogether the exercise of any of its functions here.

When, therefore, this respondent, in 1894, undertook actively to exercise its corporate functions as a trustee in this District, by the proceedings below, it was without legal authority, and it was acting in defiance of the laws of Congress.

But when the deed of trust is closely examined it will appear that the respondent itself, at the time of the execution of the deed, recognized its incapacity to act outside of the State of Maine, and never contemplated doing any act in execution of the trust within the District of Columbia, but carefully prescribed that even the sale of the District real estate should be made by it at public auction "IN SAID BANGOR" (Rec. 15) several hundred miles away.

It is only on this theory that a provision authorizing a trustee to sell real estate located in a populous city, at a place hundreds of miles away from its location, can be explained or justified.

It is not contended that the rights of the bondholders to the equitable first lien upon this property are in any way affected by the legislation of Congress. Those rights remained and still remain unaffected and unimpaired, but the situation of the bondholders is precisely as it would have been had the trust deed been to any other grantee incapable of executing the trusts, or had the trustee, being a natural person, died leaving no heirs. They would then have been compelled to proceed in equity, either to foreclose the mortgage or for the appointment of a new trustee, in the courts of this District where the property is situated.

In such a proceeding the property would have been sold here, instead of several hundred miles away, and the court could and would have protected the rights of general creditors under the assignment, while giving to the bondholders the exact measure of their rights.

As it is, this is an attempt to dispose of local assets—real estate—in a foreign market, to an undisclosed purchaser for an undisclosed price by an unauthorized trustee, and in defiance of the *lex loci rei sitae.*

II.

The Relation of Landlord and Tenant did not Exist, and the Case was not within the True Intent and Meaning of the Landlord and Tenant Act.

It is claimed by the respondent, that under the deed, by the default in payment of the debt and interest, the respondent as trustee, became *ipso facto* entitled to the possession of of the property; that thereupon the grantor in the deed and those claiming under it became tenants at sufferance of the trustee, and upon giving the notice to quit of thirty days, the trustee acquired the right to proceed under the Landlord and

Tenant Act before a justice of the peace to recover that possession.

It was upon this theory that the respondent prevailed in the Court of Appeals, and this question is the most important one in the case, not only to the petitioners, but to the community generally, as it involves the application of that summary proceeding before a justice of the peace to a class of contracts of a very intricate nature, and of very great importance, and which ever since their origin, have been the peculiar subjects of administration in equity, not only for the purposes of private justice but as matter of public policy.

It is proper also to say at this point that though this Landlord and Tenant Act was passed by Congress in July, 1864, this present case is only the fifth attempt in thirty-three years, which has been made to apply the statute to this class of contracts. This fact alone must be very persuasive with the court that the application attempted to be given to this law has never been recognized as proper at the bar.

It is respectfully submitted that a careful examination of the statute and of the numerous decisions in the various States, in which similar statutes have been passed by the legislatures and applied by the courts, must satisfy this court that the extension of the remedies provided by that statute to cases of this character is wholly without validity, against reason, and against the plain intent and purpose of Congress in passing the act.

The Landlord and Tenant Act of the District of Columbia.

The act which is now Chapter 19 of the Revised Statutes relating to the District (Sections 680 to 690 inclusive), was originally Chapter 243 of the Statutes at Large (13 Stats. 383–384) and was entitled "An act to *regulate proceedings* in cases *between landlord and tenants* in the District of Columbia," while the caption given to it in the revision is simply "Landlord and Tenant."

The meaning or force of a legislative act is not to be defeated by reference to the title, but the title is part of the act and is a proper item of consideration in getting at the intent of the legislature.

Chief Justice Marshall, in Fisher *vs.* Blight, 2 Cr. 386, in construing an act of Congress, says:

> "The first part which has been resorted to is the title. On the influence which the title ought to have in construing the enacting clauses, much has been said; and, yet, it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute, and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice and will have its due share of consideration."

In United States *vs.* Palmer, 3 Wheat. 631, Chief Justice Marshall, again discussing the question of the force which the title of an act has in construing the act itself, says:

> "The title of an act cannot control its words, but may furnish some aid of what was in the mind of the legislature. The title of this act is 'An act for the punishment of certain crimes against the United States.' It would seem offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish."

Proceeding now to the body of the statute we find its provisions to be as follows:

The first section of the revision (677) abolishes the right of distress by the landlord (Act 1867, 14 Stat. 404).

The second section (678) creates a tacit lien upon the

tenant's chattels on the premises in favor of the landlord (*Ibid*).

The third section (679) prescribes the mode of enforcement of the lien (*Ibid*).

All the following sections are from the Act of 1864 (13 Stat. 383), with scarcely any verbal change:

The fourth section (680) is as follows:

> "A tenancy at will shall not arise or be created without an express contract or letting to that effect, and all occupation, possession or holding of any messuage or real estate without express contract or lease, or by such contract or lease, the terms of which have expired, shall be admitted and held to be tenancies by sufferance."

The fifth section (681) is as follows:

> "All estates at will and sufferance may be determined by a notice in writing to quit of thirty days delivered to the tenant in hand or to some person of proper age upon the premises, or in the absence of such tenant or person, then such notice may be served by affixing the same to a conspicuous part of the premises where it may be conveniently read."

The sixth section (682) excepts from the operation of the two preceding sections contracts made prior to the passage of the act.

The seventh section (683) provides that attornments by a tenant to a stranger shall be void, and shall not affect the rights of the landlord unless made with his consent.

The eighth section (684) is as follows:

> "When forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when possession is held without right after the estate is determined *by the terms of the lease by its own limitation*, or by notice to quit, or otherwise, on written complaint on oath of the person entitled to the premises to a justice of the peace charging such forcible entry or detainer of real

estate, a summons may be issued to a proper officer, commanding the person complained of to appear and show cause why judgment should not be rendered against him."

The ninth section (685) provides that—

"The summons shall be served at least seven days before the appearance of the party complained of."

The tenth section (686) provides for the judgment.

The eleventh section (68[illegible] is as follows:

"If, upon trial, [illegible]fendant pleads title to the premises in himse[illegible] or in another person under whom he claims the premises, he shall recognize in a reasonable sum to the complainant, to be fixed by said justice, with sufficient sureties, conditioned to pay all intervening damages and costs and reasonable intervening rent for the premises; and the complainant shall in like manner recognize to the defendant conditioned to enter the suit at the next term of the Supreme Court of the District, and pay all costs adjudged against him; and thereupon the proceedings shall be certified to said court by the justice. If either party neglects so to recognize, judgment shall be rendered against him as on nonsuit or default, and execution shall issue accordingly."

Chief Justice Marshall in the case of Blight *vs.* Fisher, before referred to (2 Cr. 387), in discussing the provisions of the act then under consideration, says:

"Wherever general words have been used in these sections they are restrained by the subject to which they relate, and by other words frequently in the same sentence, to particular objects, so as to make it apparent that they were employed by the legislature in a limited sense."

All of this act relates to a particular subject—all of its language is restrained by that subject.

Thus, in the first section, the right of distraint for rent in

arrear could only apply to the conventional relation of landlord and tenant. The substitute therefor, the tacit lien in favor of the landlord conferred in the second section, and the provisions for its enforcement in the third section could only apply to that same relation. So, in the fourth section, the terms "tenancy at will" and the word "lease" in connection with, and apparently used synonomously with the word "contract," obviously apply to the conventional relation of landlord and tenant. The notice to quit provided for in the fifth section is appropriate only to the relation of landlord and tenant, and so the attornment of a tenant mentioned in the seventh section is meaningless without reference to that particular relation; while the eighth section (684), in so far as it does not relate to forcible entry and detainer, is confined strictly by its terms to the conventional relation of landlord and tenant by lease of the premises, because the language is—

> "when possession is held without right after the estate is determined *by the terms of the lease by its own limitation*, or by notice to quit, or otherwise."

Thus it will be seen that the language used and all the provisions made in this act are entirely consistent and in harmony with the purpose declared both in the title of the original act, namely: "To regulate proceedings in cases between landlord and tenants," and in the general caption "Landlord and Tenant" given to it in the revision.

There is not to be found anywhere within the language of the statute a phrase, expression, or word which indicates an intent on the part of Congress to extend the operation of the statute to any other relation (except in the case of forcible entry or detainer), than the conventional one of landlord and tenant.

To extend it beyond that relation and to cases of adverse possession by others than the actual tenant or those claiming under him, it is submitted is wholly without warrant.

If this act is not to be restricted to the conventional relation of landlord and tenant, but is to be construed according to the broadest effect which can be given to its language it would dispense with, and in effect, abolish, the action of ejectment, because by Section 680, it is provided that—

> "All occupation, possession or holding of any messuage or real estate without express contract or lease . . . shall be admitted and held to be tenancies by sufferance."

While the succeeding section, 681, provides that—

> "All estates at will or sufferance may be determined by a notice in writing to quit of thirty days."

Yet this court has affimatively decided in ruling upon the Revised Statutes of the United States relating to the District of Columbia that the action of ejectment is not abolished in this District.

Hogan *vs.* Kurtz, 94 U. S. 775.

It is submitted that nothing can be found in the language of this statute which would extend it to the case at bar, which would not equally extend it to any of the adverse occupations of real estate without contract for which the original action of ejectment would be the proper remedy.

But there is to be found in the words of the statute by which justices of the peace are created and their jurisdiction defined, express limitation which necessarily confines the operation of this statute to cases where the conventional relation of landlord and tenant exists, for by Section 997, of the Revision, quoted *supra*, there is expressly reserved from their jurisdiction cases "involving the title to real estate."

It is perfectly obvious that all controversies as to "*occupation, possession or holding of any messuage or real estate without express contract*" would necessarily "*involve the title to real estate*;" except "*in cases between landlords and tenants,*" which

are the only ones which do *not* "involve title to real estate;" and this is so for the reason that in controversies between the landlord and tenant, the landlord is not required to prove any title, because the tenant is not permitted to deny it, except where he undertakes to show that since the tenancy he himself has acquired the title, or the title of the landlord has determined. To provide for this situation arising in "*proceedings in cases between landlords and tenants*," and to preserve the exception from the jurisdiction of the justice of the peace, it is provided by Section 687, quoted *supra*, that—

> "If the defendant pleads title in himself or in another through whom he claims the case shall not be tried by the justice, but shall be certified to the Supreme Court of the District of Columbia."

The serious consequences of extending the application of this statute to any other cases than the conventional relation of landlord and tenant are too obvious to require enumeration; and while the consequences which would ensue from the application of the statute cannot be urged to defeat its plain meaning, they are entitled to be considered and are of great force where the meaning of the statute is not clear, or when it is sought to extend its provisions to cases to which it is not plainly applicable.

As said by Chief Justice Marshall, in Fisher *vs.* Blight, 2 Cr. 390:

> "Where rights are infringed; where fundamental principles are overthrown; where the *general system of the law* is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

As already stated, in the thirty-three years that this statute has been in force in the District of Columbia, only five instances of its attempted application to other than the conventional relation of landlord and tenant can be found.

Decisions in the District of Columbia.

The earliest decision of the Supreme Court of the District of Columbia upon this question is that of Spalding *vs.* Hall, 6 D. C. Rep. 123 (1864). In that case the court say (p. 129):

> "If this language be understood in its broadest acceptation, it would seem to imply that any one who had a legal title to the premises held by the tenant might institute this summary proceeding to recover possession, whether that title was derived from the actual landlord or from some other source. Obviously, that cannot be the intent and meaning of this language; for if so it would at once subvert the common law action of ejectment, and substitute this summary proceeding in its place. The use of the words 'persons entitled to the premises' instead of the word 'landlord,' as in the first section, evinces an intention on the part of the legislature to extend this summary remedy beyond the actual lessor or landlord.
>
> "The true intent and meaning of the legislature was (I think) to extend this remedy to all persons who by the act of lessor or by operation of law, are placed in the same relations to the tenant as the original lessor, to wit, the grantees or assignees, devisees and heirs-at-law of the lessor.
>
> "If this construction of the statute be the true one, it follows that these complainants cannot institute this summary proceeding against the defendants in this case. They are not grantees, devisees, or heirs-at-law of the lessor of the premises in dispute. They certainly are not the landlords of these defendants. Before the expiration of the term of the tenants now holding over, the plaintiffs or complainants obtained from Mrs. Scott, the lessor of the defendants, a lease of the premises for the term of five years, to commence at the expiration of the defendants' tenancy. No relation, therefore, of landlord and tenant ever subsisted between these parties by express contract or by implication of law. This exposition of the statute will confine its provisions to what is its declared purpose, viz., to regulate proceedings in cases between landlord and tenant."

The first departure from this ruling occurs in the decision in the case of Luchs *vs.* Jones, 1 MacA. 345 (1874).

But as appears from the report the question was not involved in the disposition of the case, and what was said was, therefore, a mere obiter. Indeed if dicta can have degrees of weight, the dicta in this case were of the least weight, because the court held that it had no jurisdiction of the case, the conclusion of the opinion being "Let the appeal be dismissed for want of jurisdiction," (p. 349).

The next case is that of Fiske *vs.* Bigelow, 2 MacA. 427 (1876), in which the decision was rendered by the same justice who decided Luchs *vs.* Jones, and though the question of jurisdiction is not noticed there and the court appears to have taken jurisdiction and decided the case, it was precisely the case of which he had, in 1 MacA., declared that they had no jurisdiction. Upon an examination of that case it will be found, first, that the question of jurisdiction was not raised and decided, and, secondly, that the question of the application of this statute to the case before the court was not raised by counsel on either side, and is not decided by the court in its opinion.

This case of Fiske *vs.* Bigelow, 2 MacA. 427, was subsequently brought to this court by writ of error, but the question of the jurisdiction of this court was not raised by either counsel or the court. No question was made, either on the assignment of errors or in the briefs of counsel, as to the Landlord and Tenant Act under which the case arose, and the questions which were presented were regarded by this court as of no consequence, for it affirmed the judgment in the following terms:

> "This judgment is affirmed. We do not think the questions involved are such as to require any further opinion."

The case is not reported, but is No. 114 of the October Term, 1879, decided January 5, 1880.

As no question was made, either in this court or in the court

below, as to the validity of the proceedings under the Landlord and Tenant Act, this court doubtless assumed that it was regularly brought under some local statute, and as the objections which were made appeared to be frivolous the judgment was simply affirmed. Whatever may have been the reasons, however, it is not an authority upon the question here presented, as this question was neither decided nor raised in any court at any stage of the proceedings in that case.

The next case, Barber *vs.* Harris, 6 Mack. 586 (1888), subsequently affirmed in this court in 129 U. S. 366, arose upon *certiorari*, and as appears by the decision of Mr. Justice Merrick, and by the decision of this court, the question was not and could not be presented in that form.

Mr. Justice Merrick says (p. 594):

> "The petition before the justice sets forth the relation of landlord and tenant, and that the justice assumed jurisdiction and acted upon the case as made. Now what may have occurred in proof we do not and cannot know upon an application for *certiorari*."

And then further, after stating the recitals of the complaint, the justice adds:

> "We are of opinion that these averments constitute fully a statement of the relation of landlord and tenant between the parties. Now whether the proofs came up to these averments or not cannot be inquired into upon a writ of *certiorari*. *Certiorari* goes only to the jurisdiction."

In the opinion of this court (129 U. S. 369) Mr. Justice Gray, stating the contents of the petition for the writ of *certiorari*, says:

> "But the petition for the writ of *certiorari*, alleges upon the oath of the petitioner, that he is in possession of the premises under a lease having nearly a year to run, with the privilege of extension for four years more."

Thus it appears that according to the petitioner's own statement he disclosed that the conventional relation of landlord and tenant did exist in that case, and the question of the proper construction and application of the statute was neither decided nor considered, because as stated by the court below, and approved by this court, the facts upon which the suit was founded were not open to inquiry upon *certiorari*.

It may well be that the proceedings in *certiorari*, instead of an appeal, were prosecuted in that case, because of the previous rulings of the Supreme Court of the District of Columbia, that no appeal would lie to the General Term from a decision at special term, upon an appeal from a justice of the peace, as had been held in Luchs *vs.* Jones, *supra*.

The next case is that of Jennings *vs.* Webb, 20 D. C. 317 (1892), heard by Justices Hagner, Cox and James, in which the court, through Mr. Justice Cox, referring to the proceedings under the Landlord and Tenant Act, say:

> "In this proceeding, *unless he establishes the relation of landlord and tenant between himself and the defendant.* no matter what the form of the declaration is, *he is not entitled to recover. I have always held that at special term,* and that is the opinion we entertain now. *It is still a landlord and tenant proceeding.*"

The foregoing presents the entire judicial construction given to the Landlord and Tenant Act from its enactment, July 4, 1864, down to June 15, 1894, a period of thirty years, when the case of Loring *vs.* Bartlett, 4 App. D. C. 1, was decided by the Court of Appeals.

From this review of the decisions it becomes apparent to the court that there is no authoritative decision in this jurisdiction in support of the position of the respondent except the case of Loring *vs.* Bartlett. And it will be further shown that this decision not only stands alone, but is directly opposed to the uniform current of decisions on the question throughout the United States.

The Deed of Trust did not Create the Grantor a Tenant, or Make the Grantee his Landlord.

The theory upon which the decision of Loring and Bartlett rests is that by the terms of the trust deed, the right of possession passed with the title to the trustees, and that the reservation of the right of possession in the grantor operated as a re-demise to the grantor by the grantee of a term in the land, which term expired upon default in the payment of the debt, and by force of the statute the grantor thereby became the tenant at sufferance of the purchaser at the trustee's sale.

This likening of the relation between mortgagor and mortgagee to a tenancy of some sort is quite usual, but is not descriptive of the real legal relations between the parties.

Washburn, in his work on Real Property (5th Ed., pp. 177, 178) says:

> "Courts and writers describe this tenancy by likening it to a tenancy at will or at sufferance, and the like, with a view to defining its character. But the nearest approximation they have made to a definition has been to establish certain resemblances to certain tenancies known to the common law, while the obvious discrepancies have shown that they were far from being identical, and illustrated the remark of Lord Mansfield when speaking of this subject, that 'there is nothing so unlike as a simile and nothing more apt to mislead.'"

It will be observed that the Court of Appeals takes no notice of the decisions previously had in this District upon this statute and cites no authority in support of its own position except that of Barber *vs.* Harris, in this court, 129 U. S. 366, *supra*, which case was, as already shown, turned upon the petition for a *certiorari* which in terms set up an actual tenancy by lease, and the further fact that the aver ments of the complaint to which the court was confined were of a tenancy in conventional form.

This position of the Court of Appeals, irrespective of the construction of the Landlord and Tenant Act, is against the weight of authority.

Thus in Hastings *vs.* Pratt, 8 Cush. 123, Chief Justice Shaw says:

> "Although in a *loose sense* a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason or the letter of the Revised Statutes, Chap. 104, Sec. 2. He is not a lessee, or holding under a lessee, or holding the demised premises without right after the determination of the lease."

So in MacCombs *vs.* Wallace, 66 N. C. 483, the court says:

> "In this case the possession of the defendant was not acquired either from the trustee or the plaintiff. There was nothing which can be called a demise. His possession arose out of his own title and continued until the sale by virtue of the reservation in the in trust to that (*sic*). His term has not expired. He had no term for that implies a term derived from some other person."

In a similar case, Burford *vs.* Nolan, 30 Miss. 428, where the land had been sold under a deed of trust containing similar provisions, the court said:

> "To sustain a proceeding of unlawful detainer under this statute the defendant must have entered into possession under the plaintiff, and must continue so to hold possession in violation of the contract of the parties. There is no pretense for saying that the defendant in this case entered into possession under the plaintiff, and he is not, therefore, entitled to this summary remedy."

In Simms *vs.* Humphrey, 4 Denio, 185, where the same contention was made, Bronson, Chief Justice, said:

> "It is said that the clause in the deed to Simms in relation to the possession of the property until the

> first of April, constituted him a tenant for part of a year, and after the day had passed he was the tenant at sufferance and so subject to removal by this summary proceeding. But the clause in question could only operate by way of exception. The possession from the date of the deed to the first of April was not granted. *Simms held during that period by virtue of his* ORIGINAL TITLE *and not under any grant* OR DEMISE *from Humphrey.*"

In Davis *vs.* Hemenway, 27 Vt. 589, the court, in speaking of the relation of mortgagor and mortgagee, says:

> "For the former (the mortgagor) is in equity the owner of the land and the interest of the mortagee is a mere chattel, and a purchaser even after a failure to perform his contract strictly in time has still an equity. And although the mortgagor after the law day has passed and a purchaser after failure to perform hold by a tenure which has been denominated a kind of tenancy by sufferance, still they are neither of them in any sense lessees."

So, in this court, in the case of Burnett *vs.* Caldwell, 9 Wall. 293, Mr. Justice Swayne, speaking of the relation between vendor and vendee, before payment of purchase money, says:

> "If the contract in such cases be silent as to possession by the vendee, he is not entitled to it. If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. *The relation of landlord and tenant does not subsist between the parties.* The characteristic feature of that relation is wanting."

It will thus be seen that the authorities generally hold that a grant of property in fee, reserving to the owner who never parts with the possession, the right of possession, does not make him derive any right of possession from his grantee.

Especially must this be so where the reservation is in the terms employed in the deed in this case.

By that clause the grantor is not only permitted to remain in possession and to receive the rents, issues and profits, but he is to do so *"In the same manner, to the same extent and* WITH THE SAME EFFECT AS IF THIS DEED HAD NOT BEEN MADE" (Rec. 15).

So that the court will see that in this case the grantor reserved to itself, *not by virtue of any demise from the grantee* but by virtue of *its original title* in fee simple the right to this possession, in the same *manner* that it had it, to the same *extent* that it had it, *and with the same effect* that it had it, *as though no deed had ever been made.* The manner of its possession and the extent of its possession were such as resulted from its ownership in fee, and the legal effect of that possession made its title and possession still allodial, holding under no superior and being the tenant of no one.

It is, therefore, apparent to the court that even if the principle of a redemise could have been rightly applied to the case of Loring *vs.* Bartlett, it could have no possible application to the deed in this case.

The Conventional Relation of Landlord and Tenant Must Exist to Bring a Case Within the True Intent and Meaning of Landlord and Tenant Statutes.

The statute in question is not a novelty in this country. Statutes similar in their general terms have been passed in nearly all, if not all, of the States of the Union, and counsel confidently challenge the counsel for the respondent to produce a single authoritative decision of any court in the United States, other than the case of Loring *vs.* Bartlett, in the Court of Appeals of this District, extending the application of statutes, similar to this, to any other cases than those where the conventional relation of landlord and tenant subsisted.

As will be shown *infra* decisions throughout the United States on similar statutes have been so numerous and so

harmonious that it may justly be said that the rule is universal that statutes of this description do not extend to cases in which the conventional relation of landlord and tenant does not exist.

Assuming that some sort of tenancy might be said to exist by virtue of this deed, it is still insisted that the Landlord and Tenant Act can have no application to the case. That question must be determined upon the words of the statute and the intent of Congress. Congress is presumed not to have been ignorant of the fact that similar statutes passed in the various States, from their adoption to the time of the passage of this statute, had received judicial construction, and if it had been the intent of Congress to give to this act the far reaching effects and consequences which are claimed for it, it would not have passed a statute similar in its general purport to those which had already throughout the several States been construed to apply only to the conventional relation of landlord and tenant.

The decisions of the Supreme Judicial Court of Massachusetts quoted below are uniform in excluding from the operation of the Landlord and Tenant Statute cases like the present. And it is probably because of those decisions that in the statute of 1882 the words "or when a mortgage of real estate has been foreclosed by a sale under a power contained therein or otherwise," were introduced.

The Massachusetts Statute (Mass. Pub. Stat., 1882, C. 175), reads as follows:

> "Sec. 1. When a forcible entry into lands or tenements has been made, or when a peaceable entry has been made and the possession is unlawfully held by force, when the lessee of lands or tenements or a person holding under such lessee, holds possession without right, after the determination of a lease by its own limitation, by notice to quit, or otherwise, or *when a mortgage of real estate has been foreclosed by a sale under a power contained therein, or otherwise*, the person entitled to the premises may recover possession thereof, in the manner hereinafter provided."

Turning now to the decisions in the State courts, they will be found uniformly to hold that statutes of this character *not containing the words above italicized* or some similar express provision, are inapplicable to any other situation than where the conventional relation of landlord and tenant exists.

Womack *vs.* Powers, 50 Ala. 5:

> "Appellees assert title to the premises under a purchase at a sale made by a trustee under a deed of trust to secure the payment of a debt, executed by the husband of one and the ancestor of the other appellant. . . . The appellees never having had actual possession of the premises cannot maintain the action of unlawful detainer. Actual possession, not constructive possession imputed by law for many purposes to the title, is necessary to maintain that action. Otherwise, in the progress of the suit a controversy as to the title which the statute forbids would inevitably arise. Dumas *vs.* Hunter, 25 Ala. 711. Russell *vs.* Desplous, 29 Ala. 308."

Steiner *vs.* Priddy, 28 Ill. 180:

> "There was no jurisdiction in the justice of the peace in this cause to evict the party. That could only be done by an ejectment. One of two things must exist to give jurisdiction in an action of forcible entry and detainer or forcible entry. There must be either a forcible entry, or the relation of landlord and tenant must exist."

West *vs.* Frederick, 62 Ill. 192.

In this case Frederick loaned a sum of money and took an absolute deed, instead of a mortgage, giving back a contract to reconvey upon the payment of the sum loaned within one year. The money not being paid at maturity Frederick brought his action of forcible detainer.

The court said:

> "This position is untenable. These parties are not vendor and vendee, and the defendant has not

> obtained possession of the land under a contract with the plaintiff. In two particulars the case is beyond the reach of the statute. It is stated by the plaintiff himself in his testimony that these instruments were executed merely as security for the loan of money. But even if the proof on this point were less conclusive the fact that the defendant did not derive his possession from the plaintiff would of itself be fatal to this action."

In Read *vs.* Elwell, 42 Me. 270, and Sawyer *vs.* Hanson, 24 Me. 542, proceedings for forcible entry and detainer under a similar statute were brought against the mortgagor, founded upon a sale of the mortgaged premises for default in payment of the debt. In both of these cases the court held that the action would not lie.

In Sawyer *vs.* Hanson, the court said:

> "To bring the case within the fifth section the relation of landlord and tenant must be shown to have existed and the lease to have terminated and the holding over by the lessee. The language clearly imports that the process under this part of the statute shall be in favor of a lessor or his assignee against a lessee, or one holding under him. The determination of the estate referred to may be of a lease for years or where a tenancy at will existed; it was not intended for those cases where the title could be contested." (pp. 544–545).

Short *vs.* Bridwell, 15 Ind. 211:

> "The appellants contend that the justice had jurisdictions under the provisions of 2 R. S. 1852, Chap. 4, p. 490.
>
> "Under this statute the relation of landlord and tenant must exist between the parties, or the defendant must have made unlawful or forcible entry into the land, and either peaceably or forcibly detained the same; or having peaceably obtained the possession he must unlawfully and forcibly keep the same; otherwise the justice has no jurisdiction."

MacCombs *vs.* Wallace, 66 N. Carolina, 482–3.

This was an action before a justice of the peace under the North Carolina statute. The defendant had executed a deed of trust to the plaintiff providing for a sale of the land if the debt was not paid, and also providing as follows:

> "It is further the understanding and agreement of the parties that the said party of the first part (the defendant) shall retain possession of the said premises until the same shall be sold by the said party of the second part."

The trustee sold the property under the deed of trust to the plaintiff who brought the action before a justice of the peace under the Landlord and Tenant Act. The court held:

> "Upon a careful consideration of this act we think it was intended only to apply to a case in which the tenant entered into the possession under some contract, either actual or implied, with the supposed landlord, or with some person under whom the supposed landlord claimed in privity, or when the tenant himself was in privity with some person who had so entered.
>
> "This construction would exclude two classes of cases, which we think were not intended to be embraced in the act, viz.: Vendees entering into possession under a contract of purchase, and vendors continuing in possession under circumstances like the present. Such persons are certainly tenants at will or sufferance for many purposes and they are frequently so called. Jones *vs.* Hitt, 64 N. C. 198. But they seem to be excluded as well by the words of the section above cited, as by the general scope and spirit of the act. The words of the section clearly require that an entry should be made under a demise of some sort, although there is no reason for saying that it must be for any definite term; it may well be at will.
>
> "In this case the possession of the defendant was not acquired from either the trustee or the plaintiff; there was nothing which can be called a demise; his

possession arose out of his own title and continued until the sale by virtue of the reservation in the in trust to that (*sic*). His term has not expired; he had no term, for that implies a term derived from some other person."

In the case of Hastings *vs.* Pratt, 8 Cushing, 121–2–3, the mortgagee attempted to obtain possession under a summary proceeding under the Landlord and Tenant Statute. Chief Justice Shaw, in rendering the decision of the court, said:

"The present statute contemplates three cases in which this process will lie. One, forcible entry; two, forcible detainer; three, a tenant holding against his landlord either (1) after the determination of a lease by its own limitation, or (2) after the expiration of a notice to quit duly given, or (3) after a notice of fourteen days for nonpayment of rent. Rev. St., Chap. 104; Statutes of 1847, Chap. 267. See Fifty Associates *vs.* Howland, 11 Met. 99. . . . Although in a loose sense a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason of the letter of the Revised Statutes, Chap. 104, Sec. 2. He is not a lessee or holding under a lessee or holding the demised premises without right after the determination of the lease. The remedies of a mortgagee are altogether of a different character clearly marked out by law. Upon the facts, the court are of opinion, that the plaintiff's case is not within the statute and that the defendant is entitled to judgment."

In the case of Boyle *vs.* Boyle, 121 Mass. 85, the same question arose and again in the case of Woodside *vs.* Ridgway, 126 Mass. 292. In both cases Mr. Justice Morton delivers very full opinions, reviewing the previous decisions in the Supreme Judicial Court of Massachusetts, and also the history of the statute.

In the case of Boyle *vs.* Boyle the learned judge says:

"We find no case in which it has been held that

> the mortgagee or other grantee not in possession can maintain this process for the purpose of obtaining possession." . . .

And again, he says:

> "It was not intended by this summary process before a justice of the peace to try questions of the title to real estate, but to give a speedy remedy to those who, being in possession of the land, are unlawfully dispossessed by a strong hand. Similar statutes in other States have received a like construction. The plaintiff, therefore, cannot maintain this action as assignee of the mortgagee and for the same reason he cannot maintain it if he has acquired a title to the estate under a sale by virtue of the power contained in the mortgage."

See also the very full discussion of this question by Chief Justice Shaw in the case of Howard *vs.* Merriam, 5 Cush. 564.

In Larned *vs.* Clarke, 8 Cush. 29, the mortgagee recovered a judgment for possession against the mortgagor, and was given possession under a writ of *habere facias*, but permitted the mortgagor to remain on the premises. The mortgagee then leased the land to the plaintiff, who then brought the present action of forcible entry and detainer (under R. S., Ch. 104) against the mortgagor:

Held, Shaw, C. J. The process given by R. S., Ch. 104, will not lie.

> "Then the question is whether the process can be maintained on the other branch of the statute, designed to afford remedies as between landlord and tenant. R. S., Ch. 104, § 2. . . . Upon the evidence reported we can see no ground to hold that the defendant ever held or claimed to hold as a tenant of Cutler (the mortgagee), or under any lease or demise whatever. . . . But whilst the parties stood in the relation of mortgagor and mortgagee and before judgment and execution, we think the defendant was not lessee within the meaning of this

> statute. A mortgagor in possession is sometimes in a loose sense said to be tenant at will to the mortgagee. But he is not liable to rent or to account for rents and profits; these he holds to his own use. He is like a tenant at will because the mortgagee may enter upon the estate at his will, if he can do so peaceably when not restrained by covenant. Moss *vs.* Gallimore, 1 Doug. 265–269. "But were the law otherwise in this respect, it would not alter the present case, because the defendant is not in as a lessee whose term is expired, and clearly is not within the statute."

In Leavitt *vs.* Wallace, 12 N. H. 493, the court, Parker, Chief Justice, says:

> "But the Act of July 1, 1831, providing further remedies for landlords and tenants is confined to these cases where there has been a tenancy, and is not to be applied to cases where the occupant holds adversely, and the relation of landlord and tenant has never existed. The title of the act indicates this. And the language in several places in the act itself shows that this is the true construction of it.
>
> "As it appears here that no tenancy had ever existed on the part of the respondent under the title set up by the complainant, this proceeding cannot be sustained notwithstanding the disclaimer."

In the case of the C., B. & Q. Road *vs.* Skupa, 16 Neb. 341, the defendant had purchased a parcel of land and entered into a contract for the deferred purchase money in which it was provided that in the event of nonpayment of the deferred purchase money, the right of possession and all equitable and legal interest in the premises should revert and revest in the vendor, and it also contained this stipulation:

> "And the party of the second part covenants and agrees that if he is allowed to remain in possession of the land after default he shall hold his possession as tenant at will of the party of the first part."

The court, Reese, Justice, after setting forth the provisions of the statute of Nebraska, says:

> "We have quoted these sections of the statute at length for the purpose of showing in what cases and under what conditions a justice has 'power to inquire' into the unlawful detention of property. . . . This contract is a contract of sale and not a lease. It must be one or the other. It cannot be said that if the purchaser fails to pay an installment of purchase money at the time it is due, the vendor cannot enforce the contract against him; that it then becomes a lease and so continues until the purchaser pays the installment due; and that such payment again changes it into a contract of sale."

The court further says:

> "So long as the contract of sale continues so long has the purchaser an interest in the subject of the contract. So long as that interest or title exists the justice has no jurisdiction in the case. In an action in ejectment or other proper proceeding in a court of general jurisdiction, all equities and defenses can be fully adjudicated. In justice's court that cannot be done for the reason that no jurisdiction or authority to do so exists, and, therefore, in suits between vendor and vendee growing out of the contract of sale the district court only has jurisdiction."

In Burford *vs.* Nolan, 30 Miss. 427–428, which was a case of unlawful detainer under the statute before a justice of the peace, the court thus states the case and applies the law:

> "Nolan executed a deed of trust to secure certain debts therein named upon a tract of land, being at the time in possession of the same, and making default in payment the land was sold by the trustee when Burford became the purchaser. Did the plaintiff pursue the proper remedy to gain possession of the land? We cannot look beyond the letter of the statute with a view of furnishing an answer to this

question; for to enable the plaintiff to succeed he must bring himself clearly within the rule which applies to all special or statutory jurisdiction."

"The statute is in these words: 'If any person shall enter or shall have entered in a peaceable manner into any lands or tenements in cases where such entry is lawful, and after the expiration of his right shall continue to hold the same against the consent of the party entitled to the possession,'" etc.

"To sustain the proceeding of unlawful detainer under this statute, the defendant must have entered into possession under the plaintiff and must continue so to hold possession in violation of the contract of the parties. There is no pretense for saying that the defendant in this case entered into possession under the plaintiff and he is not, therefore, entitled to this summary remedy."

In Roach *vs.* Cosine, 9 Wend. 232, Savage, Chief Justice. in applying the New York statute, says:

"It cannot be contended that the statute under which these proceedings were had was intended to afford an expeditious mode of foreclosing a mortgage. It was intended to apply to the cases of landlord and tenant strictly and the other cases specified. It has often been said that the mortgagor after forfeiture is *quasi* tenant of the mortgagee; but he is so only for the purpose of receiving notice to quit. 18 Johns. R. 488; 6 Cow. 148, and cases there cited. He is not that kind of a tenant, who is to be dispossessed in the summary manner contemplated by this statute."

In People *vs.* Simpson, 28 N. Y. 56, Marvin, Justice, after referring to the terms of the Statute of New York, says:

"By the construction given to the statute it must appear that the relation of landlord and tenant existed by agreement and not by mere operation of law; that the relation was conventional."

And Selden, Justice, in the same case, says (p. 58):

> "It has often been decided that to authorize such proceedings the conventional relation of landlord and tenant must be shown to exist and not a tenancy created by the mere operation of law."

In Simms *vs.* Humphrey, 4 Denio, 185, the defendant had sold the premises to the plaintiff and in the deed was a stipulation: "Possession of said premises to be retained by the said party of the first part until April 1, 1844."

The action was brought before a justice of the peace under the Landlord and Tenant Act against the defendant for holding over. The court, by Bronson, Chief Justice, after pointing out that the statute applied only to the conventional relation of landlord and tenant, said (page 188):

> "It is said that the clause in the deed of Simms in relation to the possession of the property until the first of April constituted him a tenant for a part a year, and after the day had passed he was a tenant at sufferance, and so subject to removal by this summary proceeding. But the clause in question could only operate by way of exception. The possession from the date of the deed to the first of April was not granted. Simms held during that period by virtue of his original title and not under any grant or demise from Humphrey. After the first of April it was the case of a grantor in possession after he had parted with all his original title. If that made him a tenant at sufferance to the grantee, still as the relation of lessor and lessee had never existed between the parties, the case did not come within the statute. We think the justice had no jurisdiction."

In Davis *vs.* Hemenway, 27 Vt. 589, the equitable mortgagee brought forcible entry and detainer against the defendant, the mortgagor. Redfield, Chief Justice, in delivering the opinion of the court, held:

> "In regard to the extent of this remedy it is ob-

vious to us that under the fifteenth section which expressly limits the remedy to a written lease and a demand in writing after the determination of the lease for the surrender of the premises, or the twenty-third or thirtieth sections which only extend to 'the lessee of lands,' 'or the person holding under such lessee,' could have no just application to the case of an equitable mortgagee and probably not even to the case of a purchaser of the land in possession. For the former is in equity, the owner of the land, and the interest of the mortgagee is a mere chattel, and a purchaser even after a failure to perform his contract strictly in time has still an equity. And although the mortgagor after the law day has passed and a purchaser after failure to perform, held by a tenure which has been denominated a kind of tenancy by sufferance, still they are neither of them in any sense lessees."

In Steele *vs.* Bond, 28 Minn. 267, an action was brought under the Minnesota Landlord and Tenant Statute, founded upon a lease which the defendant claimed was in reality a mortgage, but as to which the defendant was in default.

Clark, Justice, in delivering the opinion of the court, says:

"The act concerning forcible entries and unlawful detainers so far as it affords a remedy for landlords against tenants who unlawfully detain the premises after a default in the payment of the rent, or the expiration of the term, must be construed as similar acts have always been construed by the courts of other States, to apply only to the conventional relation of landlord and tenant. It was not intended as a substitute for the action of ejectment, nor to afford means of enforcing agreements to surrender possession of real estate where either the relation does not exist or has not existed. The foundation upon which the jurisdiction rests is that the tenant is in possession of the land in consequence and by virtue of that relation, and unlawfully withholds possession after a default in the performance of the terms upon which he entered, or after his term has expired. The complaint in this action states a

> case of that character and one in which the municipal court has full power to grant restitution. The answer sets up matters which control the legal effect of the laws on which the complaint is founded, and show, if true, that the relation of landlord and tenant was not created by it and does not exist between the parties. This is a good defense to the action if established" (p. 273).

In Ainslee *vs.* Howlett, 76 N. Y. 574, where the defendant claimed that the agreement between him and the plaintiff was a mortgage and not a lease, the court held that to be a sufficient defense to the proceeding under the Landlord and Tenant Act, and the court further held (p. 580):

> "The essential requisite to authorize these proceedings is that the conventional relation of landlord and tenant should exist."

In Evartson *vs.* Sutton, 5 Wend. 281, Savage, Chief Justice, delivering the opinion, says:

> "The statute under which these proceedings were had provides that where any tenant or lessee at will, or sufferance, or for part of a year, or one or more years, or from year to year, shall hold over after the expiration of his term, it shall be lawful for the landlord or lessor to make oath in writing to such holding over without permission, and thereupon to apply to a judge who shall issue a summons and take other proceedings pointed out in the statute ending in a warrant to deliver possession to the landlord or lessor. This statute is applicable between landlord and tenant only. No such relation existed between the plaintiff and Jerome, or between Jerome and Terry. The whole proceedings, therefore, from beginning to end, have been without jurisdiction and void.
>
> "The contract between the plaintiff and Jerome was set out in the affidavit upon which the proceedings were had putting the plaintiff in possession. It is a mere executory contract by which Jerome is considered the owner of the property, and he agrees

> to give possession at a certain day, and the use of the property he agrees shall be equivalent to the interest accumulating on the debt he owed the plaintiff. Now so far as analogy exists between this agreement and a lease it goes to show that the plaintiff was to set off the use of the property (or the rent) against the interest of his mortgages. Jerome in this transaction is most like a landlord, and the plaintiff a tenant; but in truth there is no pretense for anything like a tenancy. The judge might as well have undertaken to enforce any agreement for the purchase and sale of real estate. It is true indeed that for some purposes the mortgagor is considered the tenant to the mortgagee and the vendor of land who continues in possession after the sale under an agreement to deliver possession on a certain day is tenant to the purchaser. 4 John. R. 150. So, also, the same relation exists in other cases, 7 Cow. 323–6; but the statute of 1820 was clearly designed to afford a speedy remedy where the *conventional* relation of landlord and tenant existed and not where that relation is created by operation of law. The legislature never intended that a mortgagee should have a right to proceed under this statute to obtain possession of the mortgaged premises after forfeiture."

In Greer *vs.* Wilbar, 72 N. C. 592–594, Pearson, Chief Justice, in delivering the opinion of the court, says:

> "The Landlord and Tenant Act does not apply to a mortgagor who is allowed to remain in possession until default in making payment, and on demand, after default, refuses to surrender possession. MacCombs *vs.* Wallace, 66 N. C. Rep. 481. The mortgagee cannot be let into possession by summary process before a justice of the peace, but has his remedy by action to foreclose, or by action to recover the land on his legal title, to which action the equitable title of the mortgagor may be interposed by way of counter claim."

In Johnson *vs.* Hauser, 82 N. C. 385, the defendant had

agreed to purchase a piece of real estate and was put in possession by the vendors under an agreement that he would pay the balance of the purchase money at the end of twelve months or surrender up possession. The plaintiffs claimed that this made him a tenant and brought proceedings for possession under the Landlord and Tenant Act. The court by Ashe, Chief Justice, says:

> "The construction given to the Landlord and Tenant Act by several decisions of this court, is that it applies only to the relation of lessor and lessee when the latter holds over after the expiration of his term and when there is no other relation to complicate the question. But where one enters upon land under a contract of purchase he cannot be evicted therefrom by a summary proceeding under the act. Greer *vs.* Wilbar, 72 N. C. 592. Riley *vs.* Jordan, 75 N. C. 180. MacCombs *vs.* Wallace, 66 N. C. 481."

In Benjamin *vs.* Benjamin, 5 N. Y. 388, the court said:

> "To entitle a party to this summary remedy it must appear that the relation is a conventional one, created by agreement, not by mere operation of law. This is well settled. Evartson *vs.* Sutton, 5 Wend. 281; Roach *vs.* Cosine, 9 Wend. 227; Simms *vs.* Humphrey, 4 Denio, 186. The relation of landlord and tenant does not necessarily exist in many cases where the legal ownership is in one person and the possession in another, although by the express compact of the parties. . . . If any other question than such as related to the tenancy and the holding over is to be litigated between the parties, recourse must be had to an action instead of this summary proceeding" (p. 388).

In Williams *vs.* Bigelow, 11 How. Pr. 88, the plaintiff agreed to sell certain property to the defendant, who was let into possession thereof, with the agrement that it would be conveyed to him when he had finished paying the purchase money. The defendant made default in his payments, and

the plaintiff gave him a notice that he should consider the contract at an end. The defendant refused to pay the purchase money, but remained in possession and held over, but without the permission and against the will of the plaintiff. The court, by Greene, Justice, held, (page 88):

> "On this state of facts there is not even a colorable pretence for treating Williams as the tenant of Bigelow, within the meaning of that term as used in the statute. These summary proceedings are given between those who stand in the conventional relation of landlord and tenant, and not those who become such by operation of law, except in the cases specially provided for and specified in the statute."

In Stockbridge *vs.* Nute, 20 N. H. 273, the court said:

> "The two hundred and ninth chapter of the Revised Statutes was provided for the relief of landlords against their tenants and is applicable only where the relation of landlord and tenant exists, or rather, having existed, has been dissolved by the expiration of the term or by some act or omission of the parties. By the process which the statute furnishes the title to the land cannot be drawn in question, the only inquiries being, did the relation of landlord and tenant ever exist between the parties? And has the right of the defendant acquired by that been lost?"

In people *vs.* Hovey, 4 Lansing, 89, the court say:

> "No rule of law is better settled than that the relation of landlord and tenant must be proved to exist between the persons seeking to remove another who is in possession, from premises, by summary proceedings under 3d Revised Statutes."

In Mitchell *vs.* Simpson, 14 Abb. Pr. 460, the court say:

> "It (the Landlord and Tenant Act) was not intended and does not provide for the obtaining of possession of land in any case except those in which the relation of landlord and tenant exists, and applies to no one but a tenant."

In Hays' Heirs *vs.* Conneley's Heirs, 1 A. K. Marsh (Ky.), 393 (1818), Judge Owsley delivered the opinion of the court (Absent, Judge Logan):

> "The ancestor of the appellees, having obtained the possession of the land in contest, under a contract with the ancestor of the appellants for a conveyance, we are of opinion that, in the sense intended by the act regulating proceedings for forcible detainers, he cannot be said to have obtained the possession as tenant, so as to have either authorized the ancestor of the appellants in his lifetime, or his heirs since, in a proceeding under the act, to have obtained restitution, on account of the failure either of the appellees or of their ancestor, to surrender the possession.
>
> "The judgment must be affirmed with cost."

In Settle *vs.* Henson, 1 Ia. 111, the court said that there were two cases where this action applies: 1st. Where force is used in entry, etc., and 2d. Where tenant holds contrary to terms of lease. The court, in its opinion, says:

> "In regard to the 1st class of cases the proceedings are in the nature of a penal action. The offending party may be punished by fine. The case at bar must fall within this class, for there is no pretense that the defendant was the tenant of the complainant or of the United States under whom she claimed. Under these circumstances it was incumbent on the complainant to show that she was in possession at the time of the entry of which she complains. As she had never been in possession she will be driven to an action of a different form in order to vindicate her rights. . . . These actions are intended as summary remedies to restore possession which has been irregularly molested, or where there has been a holding over in flagrant violation of the terms of a lease, but can never be made a substitute for the action of right."

In State, *ex rel.* Godgion *vs.* Latimer, 26 S. Car. 208, the proceeding was by *certiorari* to test the jurisdiction of a justice

in ordering the relator ejected from certain real estate. The relator was in possession of premises under the mortgagor, and agreed with the purchaser at a foreclosure sale to lease the land from him, but he afterwards failed to do so, and refused to surrender possession.

In this case it was held that there are four classes of cases in which trial justices have jurisdiction of the matters of ejectment for summary action; first, where tenants desert the premises and fail to pay rent; second, where tenants hold over after the determination of lease; third, where tenant at will neglects to give up premises upon notice; and fourth, where tenants hold over after the expiration of their leases, or fail to pay rent.

Simpson, C. J., in delivering the opinion of the court says (page 212):

> "Now to give a trial justice jurisdiction the record must show a case falling under some one of these sections. . . .
>
> "The only charge is that the defendant was in 'unlawful possession' of the premises of Mrs. Latimer, which, if anything, was the foundation of an action in the court of common pleas. The summons then issued by the trial justice, which was the only paper before me, is entirely without any jurisdictional effect. It is apparent that he could not proceed independent of the other irregularities in the case.
>
> "Nor do we think that the testimony cured the defect. This certainly did not bring the case under Section 1818, as there was no tenancy at will. . . . And if it did, then the ten days notice was not given. Nor does it bring it under Section 1819, as there was no expiration of a lease proved, nor a failure to pay rent when due. The proof being that the relator had not secured the rent by a rent contract."

In Hughes *vs.* Mount, 23 W. Va. 130, which was an action of unlawful entry and detainer, the court, by Woods, J., at page 134, say:

> "Was this an action in which the title to land in

> the warrant mentioned would properly come in question under the trial thereof; if it was, and if the relation of landlord and tenant did not exist between plaintiffs and defendants, the justice had no jurisdiction to try the case. Upon this question he has no discretion, and the statute is imperative; IT IS HIS DUTY TO DISMISS IT. . . . But if . . . it appears on the trial of the cause that the title to the land is properly in question between the parties, and that the relation of landlord and tenant does not exist between them, then it becomes the duty of the justice to dismiss such action."

In Winterfield *vs.* Strauss, 24 Wis. 394, an application for an injunction to restrain the prosecution of an action for unlawful and forcible detainer was made. The court, Dixon, C. J., says (p. 399):

> "That the summary remedy comprehended by the statute, R. S., Ch. 151, for recovering the possession of land before justices of the peace is not one, in which the title to the premises can be brought in question, and consequently not a substitute for the action of ejectment, was long ago decided by this court. Gates *vs.* Winslow, 1 Wis. 650; Ferrell *vs.* Lamar, Id. 8. The doctrine of those cases as to the extent and application of the remedy is the same in all the States, the statutes in each embracing in substance the provisions of the old English statutes, and having the same intention, namely, to prevent and punish acts, which endanger the public peace, and to provide the summary dispossession of tenants holding over after the expiration of their terms, or contrary to the conditions or covenants of the leases or agreements, under which they entered. Cases of the latter kind are provided for by the 12th section of the act. And in those cases, of course, no question of title can arise. Since the tenant is estopped to deny the title of his landlord, the only inquiry in them is as to whether the conventional relation of landlord and tenant exists, and if it does, then whether the tenant is holding over after the expiration of his term, or contrary to the covenants or conditions of his lease.

> It is in cases of this kind that the remedy of unlawful detainer may be resorted to, and it can be extended to no other."

In Nightingale *vs.* Barrons, 47 Wisconsin, 389, a proceeding under statute of forcible entry and detainer to obtain possession of lands, the court say (p. 392), per Orton, J.:

> "We think it is the legal effect of this instrument under the circumstances, and that it was clearly the intention of the parties, that the appellant should re-enter into the possession of the premises, not as a mere lessee, but with other rights in the same (and whether as the prospective purchaser, or as mortgagor we do not decide), and that the relation between the parties in respect of the use and possession of the same was not merely of landlord and tenant. And therefore we must hold that this proceeding under the statute will not lie. In all the elements and particulars of this transaction there could not well be a stronger case presented of a conditional sale or contract of purchase, or of the keeping alive and continuance of a mortgage under the form of a lease, or the assumed relation of landlord and tenant. It was decided in Plato *vs.* Roe, 14 Wis. 453, that where an absolute deed and a contract of defeasance or to reconvey were executed, and the consideration was a loan of money, and the grantee also at the same time gave the grantor a lease of the premises, the transaction constituted a mortgage, and the pretended lessor could not have this statutory remedy as against a tenant holding over."

The case of Saunders *vs.* Doake, 3 Tex. 143, was an action before a justice of the peace under the Act of 1842 providing a summary remedy to enable landlords to obtain possession of lands, etc.

The court said (p. 144):

> "To authorize this suit defendant must have been either first, a tenant, or second, a person 'in possession' or 'holding possession' by, from, under or by collusion with a tenant. The one or the other is essential to the plaintiff's right to sue under the statute."

In Wheelock *vs.* Warschaur, 21 Cal. 309–316 (1863), the court said:

> "The right to maintain this action (of forcible entry and detainer) depends upon the existence of a tenancy, and a tenancy once created is presumed to continue so long as the tenant remains in possession."

In Pico *vs.* Cuyas, 48 Cal. 639–642 (1874), speaking of the action of forcible entry and detainer, the court said:

> " . . . The plaintiff could never recover the possession in the present form of action, because the relation of landlord and tenant did not exist by convention."

In the hearing on the writ of error it was also objected that this proceeding was in effect one to foreclose a mortgage and involved a controversy over a debt of thirty-five thousand dollars, both matters wholly without the jurisdiction of a justice of the peace. These questions are fully argued in the brief filed in this cause upon the writ of error at pages 10 to 16 inclusive, and while it is not deemed necessary to repeat the discussion here, reference is made to it in case it should interest the court in the present proceeding.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and this controversy should be left for settlement to a court of equity, to which properly belongs the superintendence of the trusts committed to the two trustees, and which has the power to preserve the legal and equitable rights of all the parties.

CALDERON CARLISLE,
WM. G. JOHNSON,
For Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 383.

EDWARD M. WILLIS AND WILLIAM G. JOHNSON, ASSIGNEE, *Plaintiffs in Error,*

vs.

EASTERN TRUST AND BANKING COMPANY, A CORPORATION, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

These cases were brought before Lewis I. O'Neal, a justice of the peace in and for the District of Columbia, to obtain possession under the Landlord and Tenant Act, of certain real estate situated in said District, fully described in the pleadings herein. The plaintiff in error interposed pleas of title, and gave bond as provided by law, and the cases were thereupon certified to the Supreme Court of the District of Columbia, for trial. The defendant in error filed a declaration of ejectment as required by the rules of said court, and the cases being thus at issue, the parties thereto entered into an agreed statement of fact in writing. whereby said causes were to be submitted to the court for its determination, without a jury. The substance of said agreement is as follows, to wit:

The defendant in error is a body corporate, organized

under the laws of the State of Maine, and having its principal place of business at the City of Bangor, in that State. The American Ice Company, also a body corporate, organized under the laws of said State, and doing business therein, and also in the District of Columbia, did on the 2d day of December, A. D. 1889, execute and deliver unto the Eastern Trust and Banking Company a certain deed of trust in the nature of a mortgage, upon certain real estate described therein, a part of which is situated in the State of Maine, and the remainder in the City of Washington, District of Columbia, to secure the payment of its certain bonds of various denominations, aggregating $40,000, payable to the order of the said defendant, in three, four, five, six, seven, eight and nine years after date, with interest thereon at the rate of six per cent. per annum. Said deed of trust was duly recorded in the land records of the District of Columbia. The original deed bears the impress of the corporate seal of the American Ice Company, and of the Eastern Trust and Banking Company, upon or near the names of said companies subscribed to said deed of trust, and it is admitted that said seals were affixed to said deed at the time of or before the execution and delivery thereof, and as required by the witnessing clause thereto, and that the Recorder of Deeds failed to note the same upon the records. The bonds were executed and delivered in due form of law to said Trust Company, and by it delivered to the parties entitled thereto by the terms and provisions of said deed of trust. Said bonds were taken by the parties to whom they were delivered for value, in the regular course of business, before maturity, and are now held and owned by them or by their assigns or legal representatives, except as to the first instalment thereof, which fell due December 2, 1892, which was paid, together with the interest accrued and due upon all of said bonds. The next instalment of bonded indebtedness which became due in December, 1893, was not paid, nor was the interest then falling due paid, nor have either of

said sums or any part of them been since paid or satisfied in any manner. The parties holding said bonds have not, nor have any of them waived their rights to said payments, in accordance with the tenor and effect of said bonds, and of said deed of trust, by the terms of which the residue of said bonded indebtedness, to wit, the sum of $35,000, together with accrued interest thereon, was, at the commencement of these suits, due and payable.

On the 13th day of October, A. D. 1893, the American Ice Company, by an instrument of writing of that date, executed and delivered in due form of law, made an assignment of all of its property, of what kind soever, for the benefit of its creditors, to Wm. G. Johnson, plaintiff in error, who accepted the trust, and entered upon its discharge. Subsequently, as such assignee, he leased that portion of the real estate which is situated in the city of Washington unto Edward M. Willis, one of the plaintiffs in error, who entered and took possession thereunder, and still retains possession.

Said lease is in writing, and bears date January 29, A. D. 1894, and is for the period of one year from said date, for rental of $130 per month (Record, 4, 5, 6).

After the default in the payment of the second instalment of bonds, and of the interest on the bonded indebtedness had continued for a period of more than ninety days, the bondholders, or those holding more than 50 per cent. of the value thereof, directed the said trustee to proceed in the execution of said trust in accordance with its terms and provisions; in pursuance of which direction the said defendant, on the 30th day of July, 1894, caused a thirty days' notice to quit to be served upon each of the plaintiffs in error, on the theory that they were statutory tenants by sufferance under the law, and that the instrument securing the indebtedness created the relation of landlord and tenant between the said Trust Company and plaintiffs; and thereafter, to wit, on the 17th day of September, 1894, the said defendant caused a seven days' summons to be issued by Lewis I. O'Neal, a justice of

the peace, as aforesaid, as provided by Sec. 684 of the Revised Statutes of the United States relating to the District of Columbia, against each of said plaintiffs, who appeared, and the case proceeded as hereinbefore stated. After the default had been made in the payment of said bonds, and the interest thereon, in pursuance of the direction of the bondholders, and of the powers conferred upon and vested in defendant by said deed of trust, it advertised said real estate for sale, in accordance with the requirements of said deed of trust, and exposed the same for sale at public auction, in the city of Bangor, at which sale a committee, acting for said bondholders, purchased the property embraced in the deed of trust for the bondholders benefit. The terms of said sale have not yet been complied with, and no deed has been made to the purchasers, it being understood and agreed between the purchasers and the defendant that said trustee should first obtain possession of the property (Record, 6 and 7).

The details of the transaction were not set forth at length in the agreed statement of facts because of a desire, believed to be mutually entertained by counsel on both sides, to avoid cumbering the record with unnecessary matter. Why, therefore, counsel should now complain in their brief that "To whom the property was sold, for what price, and upon what terms, nowhere appears," is not understood. No concealment was attempted on these or any other points on the part of defendant in error, and all that counsel on the other side recommended or suggested was inserted in the agreed statement of facts.

Judgment was rendered for said defendant in the Court of Appeals for the District of Columbia, whereupon plaintiffs brought the cases to this court on writ of error. Here, upon motion and argument, the writ of error was dismissed for want of jurisdiction (167 U. S. 76), and the cases are now before the court on writ of *certiorari* subsequently issued, on petition of plaintiffs in error, to said Court of Appeals.

ARGUMENT.

The points of law raised by the record are:

1. Does the law prevailing in the District of Columbia permit the defendant to act as trustee, and to execute the trust conferred upon it by the deed of trust in controversy?

2. How does the omission of the Recorder of Deeds to copy the corporate seals upon his records, affect the defendant's right to recover.

3. Is the power of sale in the deed of trust void? If so, how does its invalidity affect the defendant's right to recover?

4. Was the defendant entitled to appeal to the Landlord and Tenant Act in force in the District of Columbia to obtain possession of the property in controversy prior to the sale, and if so, how was that right affected by the sale?

1. A charter of incorporation imparts to the body corporate individuality and personality. Within its scope, terms and provisions, the corporation may do whatever a natural person, acting in his legal capacity, might do. This faculty, thus created, it possesses and may exercise as certainly as may an individual, not only in the place of its creation, but elsewhere, unless forbidden by law or the policy of the foreign State.

> "Beyond, as well as in the limits of the domestic sovereignty, the only difference between a natural and an artificial person, as to the recognition of their personal existence, would be, that wherever the law creating the latter should be recognized, the existence of such a being would be legal only, while that of the other would be actual as well as legal; and this is the reason why, in the absence of any local law or policy to the contrary, the same code of

comity will apply to both of them in the courts of all liberal and enlightened nations."

Lathrop *vs.* The Commercial Bank of Scioto, 8 Dana, 114.

Connecticut Mutual Life Insurance Co. *vs.* Cross et al., 18 Wis. 119.

Cowell *vs.* Springs' Co., 100 U. S. 56.

The defendant's charter provides that it shall be possessed of all the powers, privileges, and immunities, and subject to all the duties and obligations conferred upon corporations by law, except as provided therein; it empowers the corporation *inter alia*, to hold by grant, assignment, transfer, devise or bequest, any real or personal property, or trust duly created, and to execute trusts of every description. Sections 1 and 3 (Record, p. 8). The power to act as trustee, and to execute the trusts created by the conveyance of December 2, 1889, is thus expressly conferred, and can not be questioned in defendant's domicile. The charter does not forbid the defendant from acting in the quality of trustee or agent, or of exercising any of the powers conferred upon it, elsewhere than in Maine. An express authorization to exercise its chartered powers in a foreign State, would be simply nugatory. The right, privilege, or power sought to be exercised, is not, strictly speaking, a franchise, but a right belonging to a corporation equally with an individual, and may be exercised here, unless some statute either distinctly forbids it, or indicates that such exercise is opposed to local public policy. The question is a legislative and not a judicial one. Said Chief Justice Christiancy in Thompson *vs.* Waters:

"In ascertaining what the legislative policy is, we are to be guided not only by such express provisions as they have chosen to make and the natural implications from them, but also from silence which may furnish as clear an indication of what that policy was intended to be, as can be drawn from what they

have expressed; since, if they have made no provision at all upon that particular subject or branch of the subject or question involved, they intended to adopt, and left the courts to apply the generally received principles of comity, and to that extent to adopt the foreign law; and if they have chosen to leave the matter without any legislative provision, the case ought to be a very clear one indeed, which will authorize the courts to refuse such recognition on the ground that it would be prejudicial to the State."

25 Mich. 214.

There is no statutory inhibition or expression of legislative judgment that it is against the interests of the citizens of this jurisdiction to permit a foreign corporation to exercise the powers and discharge the duties imposed upon the defendant by the deed of trust under consideration.

2. The deed of trust to defendant was duly recorded and acknowledged. Its delivery passed the title to the grantee, *in præsenti*, and whether recorded or not, was good as against the grantor and his assigns without consideration. Were authorities needed to support a proposition so fundamental and well established, they are abundant.

Hastings *vs.* Vaughn, 5 Cal. 315.
Strong *vs.* Smith, 3 McLean, 362.
Stevenson *vs.* Cloud, 5 Blachf. 92.
Dole *vs.* Thurlow, 12 Metc. 157.
Brown *vs.* Moulton, 22 N. H. 468.
Jackson *vs.* Allen, 30 Ark. 110.
McMahon, 26 Wis.

The instrument is also good as to creditors and purchasers without notice and for valuable consideration. It was properly acknowledged, and was by law entitled to record.

Richardson's Supplement, Ch. 69, page 315 (Vol. 1)

The absence of the seals from the record may have in legal effect changed the character of the writing from a sealed to an unsealed instrument, as to parties having the right to rely upon the record, but it created a lien of record, of which parties dealing with the property were bound to take notice, equally as though no error had occurred in recording the deed of trust; much less can the plaintiffs, holding the title of the American Ice Company, and standing in its place with its rights not enlarged or qualified by the recording act, take advantage of the error.

3. A power of sale granted by a mortgagor on the creation of the mortgage does not conflict with the principles of equity embraced in the maxim "once a mortgage always a mortgage," or to the rules of equity as applied to mortgages. The object of a deed of trust is to secure a debt; to effect that purpose the power of sale must exist somewhere, either in express terms in the instrument itself, to be exercised as therein provided, or in some tribunal charged with the enforcement of such securities. A sale by the court is only a mode of applying the pledged property to the satisfaction of the debt. No other agent to make the sale being designated in the instrument creating the pledge, the exercise of the power by implication is referred to the courts, but it does not follow that it is not equally competent for the grantor by express language to designate some person or corporation to make it. No legal principle is thereby violated.

Said Chief Justice Gordon in Lawrence *vs.* The Farmers' Loan and Trust Co.:

> "The power to dispose of the property to satisfy the debt for which it is pledged is not collateral, but like the right of redemption, inheres in the subject. It is not an addition to the mortgage, but a part of it, and the mode in which it may be exercised is as proper a subject of agreement *prima facie*, as the terms of the mortgage itself."
>
> 13 N. Y. 209.

Such a power is sustained by English and American authorities alike.

Croft *vs.* Powell, Comyn R. 603.
Sowder *vs.* Morgan, 18 Vesey, 344.
Nothie *vs.* Edwards, 2 Colger R. 465.
Davy *vs.* Durant, 1 DeG. & J. 335.
Montague *vs.* Davis, 12 Allen, 397.
Elliott *vs.* Wood, 45 N. Y. 71.

Whether this be or be not the correct view of the case, it is immaterial to determine. The question is not whether the power of sale contained in the deed of trust is valid or invalid, or the sale made thereunder is valid or void. The remedies at law and in equity of the *cestuis que trustent* are concurrent. The adoption of the one does not exclude the other. Whether they are entitled to obtain possession through their trustee under the proceedings instituted in these causes depends upon the provisions of the deed of trust and the laws of this jurisdiction. And this brings us to the principal question in the case.

4. The estate limited in the premises and *habendum* of the deed of trust is a fee. Both the limiting clauses contain apt and technical language to create that estate. The first article of the declaration of trust provides that—

> "the American Ice Company shall be permitted and suffered to possess, manage, develop, operate, and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues, and profits thereof in the same manner, to the same extent and with the same effect as if this deed had not been made,"

until default was made in the payment of the principal or interest on said bonds, or some of them, or in respect to some of the things to be done on the part and behalf of the

grantor. The power to take possession and sell is found in the second of said articles, and is in the following language:

> "But if default shall be made by the said American Ice Company in the payment of said bonds or of any of them at the time they fall due and payable, or if said American Ice Company shall fail to pay said coupons or any of them according to the tenor thereof on the presentation and surrender of the same respectively, or if it shall fail faithfully to observe the requirements made of it by these presents, and such default shall continue for the space of ninety days, then the whole amount of the principal of said bonds, together with all accrued and unpaid interest thereon (unless such default be waived by the holders of the majority of the bonds then outstanding as hereinafter provided) shall be deemed immediately due and payable; and it shall be lawful for the trustee to enter into or upon the premises and property hereby granted or intended so to be, and to take possession of the whole or any part thereof, and to sell and dispose of all and singular the premises, property, rights, interests, and franchises hereby conveyed or mortgaged, or intended so to be, or such portion as the trustee may deem necessary, at public auction in said Bangor upon such terms as to credit, partial credit, and security for payment as it may think proper or expedient, having first given public notice of the time and place of the sale or sales by advertisement printed not less than once a week for at least four successive weeks in one or more newspapers printed and published in said Bangor, and also in Washington aforesaid. The trustees shall have the right to adjourn such sale or sales from time to time in its discretion, giving reasonable notice of each adjournment, and after so adjourning to make the sale at the time and place to which the same may be adjourned; and no other notice or demand whatsoever to and upon the party of the first part shall be necessary."

This power of sale is expressly made cumulative with the ordinary remedy of foreclosure, by entry, suit or otherwise.

The clause in the deed of trust, permitting the American Ice Company to retain possession of the property until default, is similar in language and identical in legal effect with the clause in the deed of trust considered and interpreted by the Court of Appeals of the District of Columbia in the recent case of Loring *vs.* Bartlett.

Chief Justice Alvey, speaking for the court, said:

> "The effect of the deed to the trustees was to vest the fee simple estate in them from the date of the deed, and but for the express provision or reservation in the deed which we have already recited, whereby the appellee was allowed to retain possession of the property until default, the right of possession would also have vested in the trustees from the date of the deed."
>
> 4 Appeal Cases D. C. 1.

If this be the law, then the right of the American Ice Company to the possession of the property embraced in the deed of trust terminated upon default in the payment of the bonds. That was one of the events upon the happening of which its right of possession was made to depend. The right of possession immediately accrued to the defendant, and the Landlord and Tenant Act furnished the proper remedy to enforce that right. In the case of Loring *vs.* Bartlett, *supra*, the purchaser from the trustee brought the suit. Here the trustee sues. In all other respects, the cases are similar in fact and identical in legal principle. In Loring *vs.* Bartlett the right of the purchaser from the trustees to sue was put upon the express ground that he held the trustees' title, and was substituted to their right by operation of law.

> "The property having been sold under the power in the deed after default made by the appellee, the purchaser became entitled to all of the rights vested in the trustees in regard to the possession of the

> premises, and is substituted to their rights in that respect by operation of law,"

is the language of the court. It was because the trustees were entitled to the possession of the property that the purchaser from them became entitled.

The conclusion reached by the court in this case is fortified by numerous decisions. Wilkerson *vs.* Hall was an action for double rent under the Statute of 4th George II, also for use and occupation. The court held that the provision in a mortgage permitting the mortgagor to retain possession until default in payment of principal or interest, or any covenant therein contained, operated as a re-demise to the mortgagor, until a violation of the covenants in the mortgage contained.

Justice Vaughn, in disposing of the case, said:

> "In modern times it has been usual to insert these special provisions in mortgage deeds, and the effect of this is to give the mortgagor complete control over the property as tenant for years to the mortgagee."
>
> 3d Bing. (N. C.) 508.

The case of Fisher *vs.* Giles, was an action of ejectment brought by th mortgagee against the mortgagor after default. The mortgage contained a clause permitting the mortgagee to enter upon the mortgaged premises upon default by the mortgagor in the performance of certain covenants set out in the mortgage. No notice to quit was served.

Chief Justice Best said:

> " We must look at the covenant he made with the mortgagee to ascertain what his real situation is. We find from the deed between the parties, that the possession of his estate is secured to him until a certain day, and then if he does not redeem his pledge by that day, the mortgagee has the right to enter and take possession. From that day the possession belongs to the mortgagee, and there is no more occasion for his requiring that the estate should be de-

livered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessor on the expiration of a term, and of a mortgagor who has covenanted that the mortgagee may enter upon a certain day, is precisely the same."

5. Bing. 653.

The case of George's Creek Coal and Iron Company against Detmold was an action of ejectment brought by a mortgagor against a person other than the mortgagee. The mortgage contained a reservation permitting the mortgagor to retain possession of the mortgaged premises, until default in the covenants of the mortgage. The defendant set up an outstanding title in the mortgagee. The court held it was not available to him as a defense; that the reservation of the right of possession to the mortgagor, operated as a redemise of the premises to him, and he was entitled to possession until there was a breach of the covenants. The authorities in this case were carefully reviewed, and the case was thoroughly argued. 1st Md. 225. The decisions of the Supreme Court of the District of Columbia reach the same result, though not always by the same course of reasoning.

The Landlord and Tenant Act was passed July 4th, 1864. The first case on the interpretation of this statute was that of Spalding *vs.* Hall. The facts in this case were that the defendant was in possession of certain premises under a lease which was to expire June 30, 1864. On the 16th of June, the owner of the premises leased the same to the plaintiff for five years, commencing July 1st, 1864. No notice to quit was served on defendant, and he remained in possession after the expiration of his term. Plaintiff brought suit for possession under the Landlord and Tenant Act. The court held that the defendant Hall was a tenant from

year to year, and entitled to six months' notice, which was sufficient of itself to dispose of the case, but the court went further, and held that the true intent and meaning of the legislature was to extend this remedy to all persons, who, by act of the lessor, or by operation of law, were placed in the same relation to the tenant, as the original lessor, to wit, the grantees or assignees, devisees or heirs-at-law of the lessor. 6th D. C. 124. This case was decided November 21, 1864. Ten years later the case of Luchs *vs.* Jones was decided. This was an action brought by the plaintiff to recover the possession of the premises in controversy under the provisions of the act in question. The defendant had encumbered the premises in controversy by a deed of trust in the ordinary form to secure the payment of a debt therein described. Having made default in the payment of said debt, the property was sold by the trustee named in the deed of trust, and purchased by the plaintiff, to whom a conveyance had been made by the trustee. Plaintiff served the defendant with thirty days' notice to quit, on the theory that after the sale he was statutory tenant by sufferance. The court held that the action would lie. Justice MacArthur in deciding the case said:

> "I was of the opinion that the relation of landlord and tenant between the parties could not be inferred from these circumstances, so as to bring the case within the statute upon which it was founded. A careful examination of the language used in the first section has satisfied me that in this respect, my construction of the act was erroneous. All of the judges who heard the case here, are of the same opinion. . . . The simple fact of possession where there is no contract, is a sufficient circumstance to create such tenancy, and if a man, therefore, holds possession of premises belonging to another, and there is no agreement between them, the relation of landlord and tenant arises by mere operation of the statute."

It does not appear whether there was a clause in the deed

of trust under which the property was sold, providing for the retention of possession by the grantor therein, until default was made in the payment of the indebtedness. Inferentially it would seem that there was none. If there was, it was not considered by the court, nor referred to in any way in its opinion. Strictly speaking, this case is not an authority, for the reason that the court pronouncing it was without jurisdiction to hear the cause. Appeal was dismissed on that ground.

1st MacA. 346.

The case of Fiske *vs.* Bigelow was similar in its facts, and a like conclusion was reached by the court. The defendant in this case contended that there was a defective execution of the power of sale under the deed of trust, and that therefore the plaintiff had but an equitable interest in the property. The court denied the validity of the objection, and held that an equitable title was sufficient to support the action if the case was otherwise properly brought.

2d MacA. 431.

The case of Harris *vs.* Barber was brought to this court by writ of error to reverse a judgment quashing a writ of *certiorari* to a justice of the peace for the District of Columbia. It appears by plaintiff in error's petition for the writ of *certiorari* filed in the Supreme Court of the District of Columbia, that he was in possession of a certain house and premises situate in the city of Washington in said District, as tenant under a certain lease not then expired, the terms of which are fully set out in said petition. That the leased premises were sold under a certain deed of trust prior in date to that of the lease. The purchaser was the defendant in error, Barber, who served him with a thirty days' notice to quit, and then brought an action for possession under the Landlord and Tenant Act. The justice before whom the suit was brought gave judgment for Barber. The petition

averred that the proceedings before the justice were void for want of jurisdiction, because, *inter alia*, the relation of landlord and tenant did not exist between the said Barber and plaintiff in error, by convention, and that his proper remedy was by ejectment. The court below, on motion, quashed the writ of *certiorari*, and the case came here on error from that judgment. The case was heard on motion to dismiss or affirm. Justice Gray, for the court, said:

> "But upon the merits of the case, the judgment below is so clearly right, that the motion to affirm must be granted."
>
> 129 U. S. 368.

The case below is reported in 6 Mackey, 593.

In the case of the District of Columbia *vs.* Rapley, the court held that where a *termor* remained in possession of the leased premises after the expiration of the lease, with the consent of the landlord, he became, by operation of the Landlord and Tenant Act, a tenant by sufferance, and that such tenancy might be terminated by a thirty days' notice to quit.

6 Mackey, 534.

The case of Jennings *vs.* Webb was an action brought by one tenant in common against another who was in adverse possession of the property in question. There was no contractual relation between the parties. It was a simple act of ouster by one tenant, and claim of title in himself. The court held that the Landlord and Tenant Act did not apply to such a case—that the remedy therein provided was not intended to supersede the action of ejectment.

20 D. C. 321.

This same doctrine had been announced in the case of Fiske *vs.* Bigelow, *supra*.

After discussing these cases, counsel for plaintiffs in error

make the statement that only five instances (those above referred to) of attempted application of the Landlord and Tenant Act to other than the conventional relation of landlord and tenant can be found in the thirty-three years which have elapsed since the passage of the act. While only that number of cases are *reported*, the fact is that ever since the decision in Luchs *vs.* Jones, *supra*, rendered in 1874, this statute has been uniformly applied by the justices of the peace and the Supreme Court of the District of Columbia to aid purchasers under deed of trust sales to obtain possession of the property so purchased, so that a rule of property to that effect had been established when the case of Loring *vs.* Bartlett arose and was contested in the elusive hope, evidently, that the new appellate court might disregard the rule and reverse the decisions of the old general term.

Counsel for plaintiffs in error seek to support their contention "that the deed of trust did not create the grantor a tenant or make the grantee his landlord," by the citation of several decisions by state courts, and of a decision by this court in Burnett *vs.* Caldwell, 9 Wallace, 290. This case came up from Georgia, and was an action of ejectment by Caldwell, who had sold the property involved to one Vliet under a contract of purchase silent as to the right of possession; but Caldwell, nevertheless, had put him in possession, after which Vliet sold to the plaintiff in error; default was made under the contract of purchase; Caldwell treated it as rescinded and brought ejectment, in which he recovered judgment, and this court found no difficulty in affirming the same. In the light of these facts, it is difficult to perceive what relation or application the words quoted from the opinion in said case (page 28 of their brief) or the case itself has to the present controversy.

The cases cited under the same head from Massachusetts, Mississippi and Vermont might have consistently been decided otherwise had the statutes in said States contained the

peculiar provision relative to tenants at will and at sufferance contained in our statute. In MacCombs *vs.* Wallace, 66 N. C. 483, the deed of trust contained the simple recital of an understanding that the grantor should retain possession. It lacked the formal declaration of a trust in that behalf upon which the trustee was to hold the title as in this case: besides the North Carolina statute under which the case was brought is much more limited in its scope than ours, as appears from the extract therefrom, *infra*, page 21. Simms *vs.* Humphrey, 4 Denio, 185, was the case of an absolute deed, containing a reservation or exception as to possession until April 1st, 1844, in favor of the grantor. The construction of a clause similar to that now under consideration was, therefore, not involved in that case.

The attempt of counsel for plaintiff in error to distinguish the case at bar from Loring *vs.* Bartlett and to construe the clause of redemise into a reservation of the possession to the American Ice Company by virtue of its original title, is, it is submitted, forced, and is unwarranted by the similarity in language and legal effect of the clauses in both deeds. The present case is stronger than the other, if anything, because the trustee also executes the deed, while in the Loring *vs.* Bartlett only the grantor executed it. The words "In the same manner, to the same extent and with the same effect as if this deed had not been made" express only the legal consequence of the declaration of the trust upon which the trustee, until default, was to hold the title, and, had they been omitted altogether the interest and rights of the American Ice Company would not have thereby been diminished or affected.

The adoption by courts of other jurisdictions of the lien theory in respect of mortgages, and the incorporation of equitable doctrines into the common law as administered in many of the States (independently of or previous to the adoption of codes) it renders the decisions of such States of

little or no value in the present case. It was said in this court by Mr. Justice Barbour in deciding Van Ness *vs.* Hyatt, 13 Peters, 299:

> "In 6 Gill. & Johns. 72 it is decided that a mortgagor cannot maintain trespass against a mortgagee. On the contrary in 11 Johnson (N. Y.) 534, it is decided that a mortgagor may maintain trespass against the mortgagee. In 4 Kent's Com. 154, it is said that an equity of redemption is chargeable with the dower of the wife of the mortgagor. On the contrary this court, in the case of Steele *vs.* Carroll, at the last term, 12 Peters, 201, professing to follow the law of Maryland, in other words, the common law, decided, that the widow of the mortgagor was not dowable of an equity of redemption. Now, why these contrary decisions upon these two important points, in relation to the interest, nature and character of the interest and title of a mortgagor? There can be but one answer. That in New York and other States following a similar course, the courts of law had, by a gradual progress, adopted the views of a court of equity in relation to mortgages; and considered the mortgagor, except as against the mortgagee, whilst in possession and before foreclosure, as the real owner, and even as against the mortgagee having the right of possession; whilst in Maryland, as we learn from the case before referred to, in 6 Gill. and Johnson, the legal estate is considered as being vested in the mortgagee; and that as soon as the estate in mortgage is created, the mortgagee may enter into possession, though he seldom avails himself of that right. In these antagonistic doctrines, we have the clue to the opposing decisions of the courts. Neither dower can be recovered nor trespass maintained, where there is a mere equity; nor where that is the case can a *fieri facias* be levied. The same principle then precisely, which in Maryland precludes the recovery of dower by the widow of a mortgagor, or the maintenance of an action of trespass by a mortgagor against a mort-

> gagee, exempts also the equity of redemption of a mortgagor from being liable to execution."

The same course of reasoning would warrant the court in the case at bar in refusing to consider any of the numerous cases cited by counsel for plaintiffs in error in their brief, under the caption "The conventional relation of landlord and tenant must exist to bring a case within the true intent and meaning of landlord and tenant statutes."

Should, however, the court desire to enter upon a consideration of said cases, the following brief review thereof is subjoined for the purpose of showing the inapplicability in any sense whatever of a large number of said decisions to the real question at issue, in this connection, in the present case.

Steiner *vs.* Priddy, 28 Illinois, was an action of forcible detainer by a judgment creditor against the judgment debtor, the former claiming the property in question by virtue of a sale under his judgment on execution, at which he had purchased. The case is authority only for denial of such summary relief to a purchaser at a sheriff's sale on execution, in which no contract relations of any sort, relative to the property sold, exist between the party in possession and the purchaser.

In West *vs.* Frederich, 62 Ill., the question decided was that one who loaned money and took an absolute deed from the borrower with an agreement to reconvey in one year on repayment of the money, was not entitled upon failure at the end of the year on the part of the borrower to pay the money or to give up possession of the property, to avail himself of the provisions of the following Statute of 1861, gross 361, viz. [The action of the forcible detainer is extended]:

> "To all cases between vendor and vendee where the latter has obtained possession of the land under a contract by parol or in writing, and before obtain-

> ing a deed of conveyance of the same, fails or refuses to comply with such contract to purchase."

The court found that the plaintiff failed utterly to bring himself within the terms of this statutory provision, under which he had sued, as the defendant was not put into possession by the plaintiff under a contract of purchase at all.

Short *vs.* Bridwell, 15 Ind. 211, is an incompletely reported case, the facts not being stated. All that can be gathered from the opinion is that the suit was an attempt to recover possession of land which the defendant held adversely, and from which he could therefor be only evicted, if at all, by ejectment.

MacCombs *vs.* Wallace, 66 N. C., the same case heretofore shown to be easily distinguishable from the case at bar, because of the lack of similarity between the clause providing for retention of possession (p. 18) in the one case and the clause of redemise in the other, is equally inapplicable as an authority in support of the other proposition for which it is cited, as appears from a perusal of the statute under which it was decided, the important part of which is in the following language, viz.:

> "Any tenant or lessee of any house or land and the assigns under tenants or legal representatives of such tenants, who shall hold over and continue in the possession of the demised premises, or any part thereof, without permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases, viz.:
>
> "1. 'Whenever a tenant in possession of real estate holds over after his term has expired.'
>
> "2. 'When the tenant or lessee or other person under him has done or omitted any act by which, according to the stipulation of the lease, his estate ceased.'"
>
> Acts of 1868–9 (N. C.), Ch. 156.

Greer *vs.* Wilbar and Johnson *vs.* Hauser, two other North Carolina cases cited by counsel in their brief in the present case, were decided under this same statute; which, by its language, may certainly be confined to the conventional relation of landlord and tenant with far more reason than can the District of Columbia statute.

C. B. Q. Road *vs.* Skupa, 16 Neb. 341, was brought under sections 1019 and 1020, Revised Statutes of Nebraska, which the court refers to in its opinion. Section 1019 gives any justice within his county power to inquire as well against those who make unlawful and forcible entry into lands and tenements and detain the same as against those who, having a lawful and peaceful entry, unlawfully and by force hold the same. By Sec. 1020, proceedings under this act may be had in all cases against tenants holding over their terms, in sales on executions, orders or other judicial process against the debtor, etc., in possession, in case of sales by executors, administrators and guardians, partition sales, and against persons in possession without any color of title. The railroad company had sold the land in question to defendant, who went into possession pursuant to his contract of purchase, and failed to make payments as agreed. The court were of opinion that this state of facts did not bring the case within the terms of the above statute, between which and the District of Columbia statute there is certainly little resemblance.

Leavitt *vs.* Wallace, 12 N. H. 493, was another case of adverse holding on defendant's part in which the question of title was the only question to be tried, and therefore ejectment was the only remedy. Plaintiff's attorney in his brief admitted that the title was involved, but contended that the New Hampshire statute was broad enough to try the title to land. The court held the contrary.

Some of the New York cases cited rely upon the general principle as to mortgages laid down in the case in 11 Johnson which, as above shown, this court has decided (in Van Ness *vs.* Hyatt) to be contrary to the law as interpreted and

applied in Maryland and this District, and all of said cases proceed on a narrow construction of the New York statutes as compared with the uniform course of the District of Columbia courts in construing our own act.

The Vermont statute expressly confines relief to the case of a written lease or to a proceeding against one who is "the lessee of lands;" hence the decision in Davis *vs.* Hemenway, 27 Vt., cited by plaintiff in error. Aside from this difference in the statute the case itself is not applicable on the facts to the present controversy, since there was no contract whatever between the parties from which a lease could have been implied. Defendant being the owner of certain land conveyed the same to one Jacob Davis in consideration of $1,000, and said Davis thereupon gave to a trustee for defendant a writing by which he agreed to reconvey to the defendant in three years upon payment of $1,000, and $60 annually, taxes, etc. After this contract had been assigned to other parties who made default under it, and after a similar contract had been again made between said J. Davis and defendant, and the time for payment limited thereunder had expired, said J. Davis sold and conveyed to the plaintiff, who, as owner by virtue of the deed from J. Davis to him, brought this action to recover possession. The court held that the transaction between the defendant and the plaintiff's vendor amounted to an equitable mortgage, that defendant still had the right to redeem the property therefrom, and (from the evidence on that point) that the plaintiff had knowledge of the true state of affairs at the time of his purchase, and could therefore not dispute the right of defendant to his equity of redemption, or deprive him of his possession, by a landlord and tenant proceeding. In the trust deed in the case at bar the right to redeem is expressly waived.

While the language quoted from the opinion in Steele *vs.* Bond, 28 Minn. 267, is in accord with the argument of counsel for plaintiffs in error here, the only matter *decided* in the case was that where a plaintiff claimed under a written

lease which the defendant claimed was executed as security for a loan and intended as a mortgage, it was error for the justice to proceed with the trial of the case instead of sending it at once to the District court. It appears from the opinion that had the case been certified in due form to the District court and the defendant's defense proven, it would have been the duty of the District court to dismiss the action, in other words, that the Minnesota Landlord and Tenant Statute does not apply to the case of an equitable mortgage under which no foreclosure has been had. But this is due to the fact that the Minnesota statute contains *express* provision for the relief of a mortgagor *after* foreclosure, and, therefore, by necessary implication, denies it to him *before* foreclosure. The portion of this statute, which is quoted and construed in this case, is as follows:

> "When any person holds over any lands or tenements after a sale thereof on an execution, judgment, *or on a foreclosure of a mortgage by advertisement and expiration of the time for redemption*, or after the termination of the time for which they are demised or let to him, or to the person under whom he holds possession, or contrary to the conditions or covenants of the lease or agreement under which he holds, or after any rent becomes due according to the terms of such lease or agreement, or after any tenant at will holds over after his estate is determined by notice to quit,"

he may be proceeded against as thereinafter provided.

Gen'l Stat. of Minn., 1878. Revision, Sec. 6118.

The plaintiff, in People *vs.* Hovey, 4 Lansing, 89, would have failed as certainly in this District as in New York, as the proof disclosed a case of adverse holding by one party under a tax title and by the other under a receiver's deed. Recourse was had to these summary proceedings solely because plaintiff contended that the defendant had gotten into

possession through collusion with his, the plaintiff's, tenant, but he failed to establish this contention.

Mitchell *vs.* Simpson, 3 R. S. 14, Abb. Pr. 460, as well as People *vs.* Simpson, 28 N. Y. 56, failed because the court decided the facts in the case did not make the defendant tenant by sufferance of the plaintiff. In one case the defendant was a grantor in possession—the case of an actual sale in which possession had not been duly delivered—in the other case Mitchell went into possession under a written lease, which he afterwards assigned to A. S., who assigned to I. S. The court held that the statement of law in the affidavit upon which the action was instituted, to the effect that, upon the above facts, Mitchell was tenant by sufferance to I. S., was erroneous. These actions were brought under a statute (See 3d Rev. Stat. N. Y. 863, 5th Ed.) providing that any tenant at will or at sufferance might be removed, etc., when he held over after the expiration of his term without permission of his landlord. This statute left the court to define what was meant by tenants at will and at sufferance, and so permitted a narrow construction of the latter term, unlike our own statute which in itself contains in legal effect an interpretation of "tenancy at sufferance," and that on very broad and liberal lines (Sec. 4).

CONCLUSION.

It will thus be seen that by virtue of the common law as interpreted and applied in this District, and also by the express contract contained in the deed of trust, the American Ice Company became, upon the execution and delivery of the deed, the tenant of the Eastern Trust and Banking Company, and, upon default, the latter became entitled to appeal to the proceedings provided for by the Landlord and Tenant Act to obtain possession.

The notice to quit was served prior to the sale. The de-

fendant promised at the time of the sale, to obtain possession for the purchaser, to finish what it had commenced. The purchaser has not complied wlth the terms of sale. The trustee has not obtained possession of the property, and, until it has, cannot compel the purchaser to complete his purchase. The sale was conditioned upon the obtaining of possession by the trustee, and is abortive and goes for naught unless it is obtained. The trustee is in default and not the purchaser. The announcement that the trustee would obtain and deliver possession to the purchaser, may well have had a material influence upou the bidding. The trouble, expense and delay incident thereto were things of value, not to be held for naught. It is respectfully submitted that the judgment below ought to be affirmed.

B. F. LEIGHTON,
Counsel for Defendant in Error.

WILLIS v. EASTERN TRUST AND BANKING COMPANY.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 383. Submitted October 18, 1897. — Decided February 21, 1898.

A summary process to recover possession of land, under the landlord and tenant act of the District of Columbia, (Rev. Stat. D. C. c. 19,) can be maintained only when the conventional relation of landlord and tenant exists or has existed between the parties; and cannot be maintained by a mortgagee against his mortgagor in possession after breach of condition of the mortgage, although the mortgage contains a provision that until default the mortgagor shall be permitted to possess and enjoy the premises, and to take and use the rents and profits thereof, "in the same manner, to the same extent, and with the same effect, as if this deed had not been made."

THIS was a summary process to recover possession of land in the city of Washington, under section 684 of the Revised Statutes of the District of Columbia, commenced September 17, 1894, by complaint before a justice of the peace, by the Eastern Trust and Banking Company against Edward M. Willis and William G. Johnson, each of whom pleaded title in Johnson; and the case was thereupon certified to the Supreme Court of the District of Columbia.

In accordance with a general rule of that court, requiring the plaintiff, in such a process, to file "a declaration making demand for the possession of the premises, with a description thereof, as in ejectment," the plaintiff filed a declaration, demanding possession of the land, describing it by metes and bounds, and alleging that the defendants entered thereon, and unlawfully ejected the plaintiff therefrom, and unlawfully detained the same from the plaintiff.

The parties submitted the case to the determination of the court, without a jury, upon an agreed statement of facts, in substance as follows:

The plaintiff was a corporation organized under a charter granted by the legislature of the State of Maine, by which it

was located at the city of Bangor in the county of Penobscot, and was authorized to establish agencies elsewhere in that State. Johnson was sued as assignee of the American Ice Company, a corporation of Maine, and doing business at Bangor and also at the city of Washington; and Willis was sued as the tenant or lessee of Johnson.

On December 2, 1889, by an indenture, in the nature of a mortgage, executed in Maine, and duly recorded in that State and in the District of Columbia, the American Ice Company conveyed to the Eastern Trust and Banking Company, "and its successors, in trust, with full power of succession to and enjoyment of the franchises of the corporation, all its real estate, wharves, icehouses, boarding-house, stables, boilers, elevator and machinery, situated in the town of Hampden in said county of Penobscot, and in the city of Washington in the District of Columbia, together with all and singular the privileges and appurtenances thereto belonging," to secure the payment of bonds of the ice company to the amount of $40,000, payable to the trust company at its office in Bangor in equal instalments of $5000 each, in three, four, five, six, seven, eight, nine and ten years after date, with interest. The deed provided, among other things, as follows:

First. "Until default shall be made in the payment of the principal or interest of said bonds or some of them, or in the maintenance of insurance, or in the payment of taxes or assessments as herein provided, or until default shall be made in respect to something by these presents required to be done by said party of the first part, the American Ice Company shall be permitted and suffered to possess, manage, develop, operate and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues and profits thereof, in the same manner, to the same extent, and with the same effect, as if this deed had not been made."

Second. If the ice company shall pay the principal and interest, and do all other things required to be done on its part, this deed shall be void. But if any default shall be made, and shall continue for ninety days, the whole amount of the bonds, principal and interest, shall be deemed immediately due and

payable, "and it shall be lawful for the trustee to enter into or upon the premises and property hereby granted, or intended so to be, and to take possession of the whole or any part thereof," and to sell and dispose of the same by public auction in Bangor, giving notice, as therein required, in newspapers published in Bangor and in Washington, and "in its own name, or in the name of the American Ice Company, to make, execute, acknowledge and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance of the property so sold; and any sale made as aforesaid shall be a perpetual bar, both at law and in equity, against the American Ice Company, and all persons claiming by, through or under it, from claiming the property, rights, interests and franchises so sold, or any interest therein." The proceeds of the sale, after payment of expenses, shall be paid over ratably to the bondholders, and the remainder, if any, to the ice company.

Third. "The foregoing provision for a sale under the power aforesaid is cumulative with the ordinary remedy of foreclosure by entry or suit therefor; and the trustee hereunder may, upon default being made as aforesaid, institute and carry out proceedings to foreclose this mortgage or deed of trust, by suit or otherwise, in such manner as may be authorized by law for the foreclosure of mortgages of real estate. And the American Ice Company hereby waives any and all rights of sale or redemption, now or hereafter provided by the statutes of Maine or of the United States."

The bonds were duly issued, as recited in the mortgage, and were delivered to and held by purchasers for value in the regular course of business. The first instalment of the bonds, and all interest which fell due on or before December 1, 1892, were paid. The rest of the bonded debt, and the interest thereon, were never paid, and were due and payable at the time of the commencement of this suit.

On October 13, 1893, the ice company executed to Johnson an assignment of all its property for the benefit of its creditors, under the act of Congress of February 24, 1893, c. 157. 27 Stat. 474. Johnson accepted the assignment, and assumed

Counsel for Parties.

the duties of assignee; and as such, on January 29, 1894, executed to Willis a lease in writing of all the ice company's real estate in the city of Washington, for one year from that date, at a monthly rent of $130.

After the default which took place on December 1, 1893, had continued more than ninety days, a majority of the bondholders directed the trust company to proceed in the execution of the trust. In pursuance of that direction, and of the power contained in the mortgage, the trust company advertised and exposed the whole mortgaged property for sale by auction at Bangor on May 4, 1894. The sale was adjourned until September 8, 1894, when the property was sold, and was purchased by a committee of the bondholders, and for their benefit. The terms of the sale have not yet been complied with, nor any deed made to the purchasers, it being understood and agreed between them and the trustee, at the time of the sale, that the trustee should first obtain possession of the property.

The trust company, on July 30, 1894, caused a thirty days' notice to quit to be served on Johnson and on Willis; and on September 17, 1894, commenced this suit to recover possession of the property by causing a seven days' summons to be issued to each of them by a justice of the peace of the District of Columbia; and thereupon subsequent proceedings took place as above stated.

Upon the agreed statement of facts, the Supreme Court of the District of Columbia gave judgment for the defendants. The plaintiff appealed to the Court of Appeals, which reversed the judgment, and remanded the case with directions to enter judgment for the plaintiff. 6 App. D. C. 375. The defendants sued out a writ of error from this court, which was dismissed for want of jurisdiction. 167 U. S. 76. They then obtained from this court this writ of certiorari to the Court of Appeals, under the act of March 3, 1897, c. 390. 29 Stat. 692; 167 U. S. 746.

Mr. Calderon Carlisle and *Mr. William G. Johnson* for Willis and Johnson.

Mr. B. F. Leighton for the Trust and Banking Company.

Opinion of the Court.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

Sections 680–691 of the Revised Statutes of the District of Columbia, contained in chapter 19, entitled "Landlord and Tenant," are a reënactment of the act of Congress of July 4, 1864, c. 243, entitled "An act to regulate proceedings in cases between landlord and tenants in the District of Columbia." 13 Stat. 383.

By sections 681 and 682, (reënacting section 1 of the act of 1864,) "a tenancy at will shall not arise or be created without an express contract or letting to that effect, and all occupation, possession or holding of any messuage or real estate, without express contract or lease, or by such contract or lease the terms of which have expired, shall be deemed and held to be tenancies by sufferance;" and "all estates at will and sufferance may be determined by a notice in writing to quit of thirty days."

By section 684, (reënacting section 2 of the act of 1864,) "when forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when possession is held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise," then, "on written complaint, on oath, of the person entitled to the premises, to a justice of the peace, charging such forcible entry or detainer of real estate, a summons may be issued to a proper officer, commanding the person complained of to appear and show cause why judgment should not be rendered against him."

The statute further provides as follows: The summons shall be served at least seven days before the appearance of the party complained of. If it appears by default, or upon trial, that the plaintiff is entitled to the possession of the premises, he shall have judgment and execution for the possession and costs; if the plaintiff fails to prove his right to possession, the defendant shall have judgment and execution for his costs. If, upon trial, the defendant pleads title in himself, or in another person under whom he claims the premises, the case is

to be certified to the Supreme Court of the District of Columbia, and each party is to recognize to the other, the defendant "to pay all intervening damages and costs and reasonable intervening rent for the premises," and the plaintiff to enter the suit and to pay all costs adjudged against him. An appeal to the same court may be taken by either party against whom judgment is rendered by the justice of the peace. Rev. Stat. D. C. §§ 685–689; Act of July 4, 1864, c. 243, §§ 2–4; 13 Stat. 383, 384.

This plaintiff is the mortgagee of land in the District of Columbia, under a deed of trust to secure the payment of certain bonds, in instalments payable in successive years, with interest; and providing that until default the mortgagor shall be permitted to possess and enjoy the property, and to take and use the income, rents, issues and profits thereof, "in the same manner, to the same extent and to the same effect, as if this deed had not been made;" but that, if any default be made, and be continued ninety days, the trustee may enter upon the property, and sell the same by public auction, or may pursue the ordinary remedy of foreclosure by entry or suit, as authorized by law.

The mortgagor assigned the property to an assignee for the benefit of creditors; the assignee made a lease in writing thereof for a year at a monthly rent; default was made and continued for ninety days; and the mortgagee, after giving the assignee and his lessee thirty days' notice to quit, instituted this process against them to recover possession under the landlord and tenant act of the District of Columbia.

The principal question presented by the record is whether, in a case like this, where there has been neither forcible entry nor detainer by force, a mortgagee entitled to possession after condition broken is within the scope and effect of the statute.

In *Barber* v. *Harris*, (1888) 6 Mackey, 586, affirmed by this court in *Harris* v. *Barber*, (1889) 129 U. S. 366, cited in support of the judgment below, this question was not and could not be decided. That case arose upon a writ of certiorari to a justice of the peace, by which his judgment for

possession under the statute was sought to be set aside upon allegations that the plaintiff was a purchaser at a sale under a mortgage, and the conventional relation of landlord and tenant did not exist between the parties, and therefore the justice of the peace had no jurisdiction. The ground on which both the Supreme Court of the District of Columbia and this court declined to set aside the judgment of the justice of the peace was, that the existence of the relation of landlord and tenant between the parties, and the jurisdiction of the justice of the peace over the case, were sufficiently shown by general allegations in the complaint that the plaintiff was entitled to the possession of the premises, and that they were detained from him and held without right by the defendant, tenant thereof by the sufferance of the plaintiff, and whose tenancy and estate therein had been determined by thirty days' notice to quit; and that these allegations could not be contradicted upon that writ of certiorari. See 6 Mackey, 594, 595; 129 U. S. 368, 371.

In *Jennings* v. *Webb*, (1892) 20 D. C. 317, 322, in which it was decided that one tenant in common could not maintain this form of proceeding against his co-tenant, Justice Cox, speaking for Justices Hagner and James, as well as for himself, said: "There seems to be a little misapprehension of the nature of this proceeding. While our rule requires the plaintiff to file a declaration, as in ejectment, that does not convert the proceeding into an action of ejectment at all, in which the plaintiff recovers upon the strength of his title. In this proceeding, unless he establishes the relation of landlord between himself and the defendant, no matter what the form of declaration is, he is not entitled to recover. I have always held that at special term, and that is the opinion that we entertain now. It is still a landlord and tenant proceeding."

In two earlier cases, a purchaser at a sale under a deed of trust in the nature of a mortgage had been declared, by the Supreme Court of the District of Columbia in general term, to be entitled to maintain this proceeding against the mortgagor, who had remained in possession without the plaintiff's consent, and had been served with a thirty days' notice to quit.

But in the first of those cases this was wholly *obiter dictum*, the appeal to the general term being dismissed because the judgment in special term was final; and in the other case no question appears to have been raised upon the construction of the statute. *Luchs* v. *Jones*, (1874) 1 McArthur, 345; *Fiske* v. *Bigelow*, (1876) 2 McArthur, 427.

Afterwards, in *Loring* v. *Bartlett*, (1894) 4 App. D. C. 1, the Court of Appeals, speaking by Chief Justice Alvey, reversing a judgment of the Supreme Court of the District of Columbia, and quoting from *Birch* v. *Wright*, 1 T. R. 378, 382, 383, refrained from expressing a definite opinion upon the question "whether the simple and ordinary relation of mortgagor and mortgagee involves the relation of landlord and tenant by implication of law, within the meaning and sense of the statute;" and maintained the suit, solely upon the ground that a provision, in a trust deed to secure the payment of promissory notes, by which the mortgagee and her heirs and assigns were to be permitted "to use and occupy the said described premises, and the rents, issues and profits thereof to take, have and apply, to and for her and their sole use and benefit, until default be made in the payment of said notes or any of them," constituted a re-demise from the mortgagee to the mortgagor, which would support a proceeding under the statute. The cases relied on in support of that decision were *Georges Creek Co.* v. *Detmold*, 1 Maryland, 225, 236, and some English cases, all of which were ordinary actions of ejectment, and none of them under statutes like that now in question.

The decision in *Loring* v. *Bartlett* was followed by the Court of Appeals in the present case, without further discussion. 6 App. D. C. 375, 383.

Upon full consideration of the terms of the act of Congress, and in view of the existing state of the law in this country at the time of its passage, this court is unable to concur in the conclusion of the Court of Appeals.

The common saying that a mortgagor in possession is tenant at will to the mortgagee has been often recognized to be a most unsafe guide in defining the relation of mortgagee and

mortgagor, or in construing statutes authorizing landlords to recover possession against their tenants by summary process before a justice of the peace.

In *Moss* v. *Gallimore*, (1779) Lord Mansfield said: "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only so *quodam modo*. Nothing is more apt to confound than a simile. When the court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases." 1 Doug. 279, 282, 283. And in *Birch* v. *Wright*, (1786) Mr. Justice Buller said: "He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands." 1 T. R. 378, 383.

Under early statutes of the State of New York, providing that any tenant at will, or at sufferance, or for years, holding over without permission of his landlord after the expiration of his term, or after default in the payment of rent, might be removed from the possession upon a proceeding commenced by the landlord before a justice of the peace, it was constantly held by the Supreme Court of the State that a mortgagee could not maintain this process against a mortgagor in possession; and Chief Justice Savage said that for some purposes, indeed, the mortgagor, after condition broken, was considered as tenant to the mortgagee; but that the statute "was clearly designed to afford a speedy remedy where the conventional relation of landlord and tenant existed, and not where that relation is created by operation of law;" and "the legislature never intended that the mortgagee should have a right to proceed under this statute to obtain possession of the mortgaged premises after forfeiture." N. Y. Stat. of 1820, c. 194; 2 Rev. Stat. of 1828, pt. 3, c. 8, tit. 10, §§ 28 *& seq*; *Evertson* v. *Sutton*, (1830) 5 Wend. 281, 284; *Roach* v. *Cosine*, (1832) 9 Wend. 227, 231, 232; *Sims* v. *Humphrey*, (1847) 4 Denio, 185, 187; *Ben-*

jamin v. *Benjamin*, (1851) 5 N. Y. 383, 388; *People* v. *Simpson*, (1863) 28 N. Y. 55, 56.

It is true, as has been heretofore observed by this court, that in the State of New York the courts of law had, by a gradual progress, adopted the views of courts of equity in relation to mortgages, and considered the mortgagor, whilst in possession and before foreclosure, as the real owner, except as against the mortgagee, and as having the right of possession, even as against the mortgagee; whereas by the law of Maryland, prevailing in the District of Columbia, the legal estate is considered as vested in the mortgagee, and, as soon as the estate in mortgage is created, the mortgagee may enter into possession, though he seldom avails himself of that right. *Van Ness* v. *Hyatt*, 13 Pet. 294, 299.

But the mortgagee has been equally held not to be entitled to maintain against the mortgagor a summary landlord and tenant process in States where, as in New England, the mortgagee is held to be the owner of the legal title. 1 Jones on Mortgages, § 58.

The Revised Statutes of Massachusetts of 1836, c. 104, §§ 2, 4–9, contained provisions very similar to those of §§ 2–4 of the act of Congress of July 4, 1864, as to the cases in which and the persons by and against whom the proceedings might be instituted, the service of summons, the form of judgment, and the removal of the case, by certificate or by appeal, into a court of record.

In that chapter of the Massachusetts statutes of 1836, section 2 was as follows: "When any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, and also when the lessee of any lands or tenements, or any person holding under such lessee, shall hold possession of the demised premises, without right, after the determination of the lease, either by its own limitation, or by a notice to quit, as provided in the sixtieth chapter," (section 26 of which provided that estates at will might be terminated by either party by notice of three months, or by the landlord by fourteen days' notice in case of non-payment of rent,) "the person entitled to the premises may

be restored to the possession thereof, in the manner hereinafter provided." And by section 4, "the person entitled to the possession of the premises" might obtain from a justice of the peace a summons to answer to a complaint charging the defendant with being in possession of the land in question, and holding it unlawfully and against the right of the plaintiff.

It was the settled construction of that statute by the Supreme Judicial Court of Massachusetts, that a mortgagee, even after he had entered for the purpose of foreclosure, could not maintain an action against his mortgagor to recover possession of the mortgaged premises. "Whilst the parties stood in the relation of mortgagor and mortgagee," said Chief Justice Shaw, "the defendant was not lessee, within the meaning of this statute. A mortgagor in possession is sometimes, in a loose sense, said to be tenant at will to the mortgagee. But he is not liable to rent, or to account for rents and profits; these he holds to his own use. He is like a tenant at will, because the mortgagee may enter upon the estate at his will, if he can do so peaceably, when not restrained by covenant." *Larned* v. *Clarke*, (1851) 8 Cush. 29, 31. And again: "The present statute contemplates three cases in which this process will lie: 1. Forcible entry; 2. Forcible detainer; 3. A tenant holding against his landlord, either (1) after the determination of a lease by its own limitation; or (2) after the expiration of a notice to quit duly given; or (3) after a notice of fourteen days, for non-payment of rent. In the present case, the proof shows no forcible entry, no forcible detainer, no holding over of a tenant of demised premises. These are the only cases contemplated in this statute in which this summary process will lie. Although, in a loose sense, a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason or the letter of the Revised Statutes, c. 104, § 2. He is not lessee, or holding under a lessee, or holding demised premises without right, after the determination of the lease. The remedies of a mortgagee are altogether of a different character, clearly marked out by law." *Hastings* v. *Pratt*, (1851) 8 Cush. 121, 123. See also *Dakin* v.

Allen, (1851) 8 Cush. 33; *Gerrish* v. *Mason*, (1855) 4 Gray, 432.

In chapter 137 of the General Statutes of Massachusetts of 1860, the provisions of the Revised Statutes of 1836, above mentioned, were substantially reënacted, section 2 being put in the following form: "When a forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when the lessee of land or tenements, or a person holding under such lessee, holds possession without right, after the determination of the lease by its own limitation, or by notice to quit, or otherwise, the person entitled to the premises may be restored to the possession in the manner hereinafter provided." The words "or otherwise" were apparently added in that section, because of its having been decided, under the earlier statute, that "the determination of the lease by its own limitation" did not include its determination by the lessor's entry for breach of a condition in the lease. *Fifty Associates* v. *Howland*, (1846) 11 Met. 99; *Whitwell* v. *Harris*, (1871) 106 Mass. 532.

By section 5 of the statute of 1860, "the person entitled to the possession of the premises" may obtain from a justice of the peace a summons "to answer to the complaint of the plaintiff, for that the defendant is in possession of the lands," "which he holds unlawfully and against the right of the plaintiff."

The provision, above quoted, of the statute of 1860, which defines the circumstances under which this summary process may be commenced before a justice of the peace, is almost exactly like the corresponding provision of the act of Congress of 1864, as will appear by putting the two together, with those words of the Massachusetts statute which have been omitted in the act of Congress printed in italics, and the words added in the act of Congress enclosed in brackets, as follows: "When *a* forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when *the lessee of land or tenements, or a person holding under such lessee, holds* possession [is held] without right, after the *determination* [estate is determined by the terms] of the lease by its own limitation, or by notice to quit, or otherwise."

This provision, as incorporated in the act of Congress, though somewhat condensed in form, is essentially in the same words, and of precisely the same meaning, as the provision of the statute of Massachusetts. While it omits the words "the lessee of land or tenements, or a person holding under such lessee," it still, like the Massachusetts statute, (in cases where there is neither forcible entry nor forcible detainer,) is restricted to cases in which "the lease" has been determined, and differs in this respect from the provision in the first section of the act of Congress, which defines tenancies by sufferance.

The statute of Massachusetts and the act of Congress resemble each other in many other respects. Each authorizes "the person entitled to the premises" to recover possession by complaint to a justice of the peace. Each authorizes the complaint to be in general terms; in Massachusetts, alleging that the defendant is in possession of the land, and holds it unlawfully and against the right of the plaintiff; in the District of Columbia, "charging a forcible entry or detainer of real estate." Each requires the summons to be served seven days before appearance. The provisions as to the form of the judgment of the justice of the peace for either party are exactly alike in both statutes. Each statute provides that, when the title is put in issue, the case may be certified to a court of record; that from any judgment of the justice of the peace an appeal may be taken by either party to that court; and that upon such removal, either by certificate or by the defendant's appeal, the defendant shall recognize to the plaintiff, with sufficient sureties, to pay intervening rent and damages. Mass. Gen. Stat. of 1860, c. 137, §§ 6–10; Act of Congress of July 4, 1864, c. 243, §§ 2–4; Rev. Stat. D. C. §§ 684–689.

The resemblance between the provisions of the Massachusetts statute of 1860 and of the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded. *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Pennock* v.

Dialogue, 2 Pet. 1, 18; *Metropolitan Railroad* v. *Moore*, 121 U. S. 558, 572; *Warner* v. *Texas & Pacific Railway*, 164 U. S. 418, 423. In *Metropolitan Railroad* v. *Moore*, just cited, where provisions of statutes of New York, regulating judicial procedure, had been incorporated by Congress, in substantially the same language, in the legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted those provisions as then understood in New York and already construed by the courts of that State, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia.

Before the passage of the act of Congress of 1864, the Supreme Judicial Court of Maine had held that a mortgagee could not proceed against his mortgagor under a statute of that State, the leading sections of which provided that "a process of forcible entry and detainer may be commenced against a disseizor, who has not acquired any claim by possession and improvement; and against a tenant holding under a written lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, without notice;" "and against a tenant at will, whose tenancy has been terminated" by notice to quit, in which last case "the tenant shall be liable to the process aforesaid without further notice, and without proof of any relation of landlord and tenant." Maine Rev. Stat. of 1857, c. 94; *Reed* v. *Elwell*, (1858) 46 Maine, 270, 278, 279; *Dunning* v. *Finson*, (1859) 46 Maine, 546, 553. See also *Sawyer* v. *Hanson*, (1845) 24 Maine, 542; *Clement* v. *Bennett*, (1879) 70 Maine, 207.

Similar opinions have been expressed in cases arising in other States under statutes differing in language, but having the same general purpose. *Davis* v. *Hemenway*, (1855) 27 Vermont, 589; *McCombs* v. *Wallace*, (1872) 66 No. Car. 481; *Greer* v. *Wilbar*, (1875) 72 No. Car. 592; *Necklace* v. *West*, (1878) 33 Arkansas, 682; *Nightingale* v. *Barens*, (1879) 47 Wisconsin, 389; *Steele* v. *Bond*, (1881) 28 Minnesota, 267; *Chicago, Burlington & Quincy Railroad* v. *Skupa*, (1884) 16 Nebraska, 341. We have not been referred to, and are not aware of, a single case in any State in which a summary

process of this kind has been maintained by a mortgagee against his mortgagor, unless specifically given by distinct provision in the statute.

The view which has been generally, if not universally, entertained by the courts of the several States upon this subject has been well expressed by the Supreme Court of Minnesota in *Steele* v. *Bond*, above cited, as follows: "The act concerning forcible entries and unlawful detainers, so far as it affords a remedy for landlords against tenants who unlawfully detain the premises after a default in the payment of the rent, or the expiration of the term, must be construed as similar acts have always been construed, by the courts of other States, to apply only to the conventional relation of landlord and tenant. It was not intended as a substitute for the action of ejectment, nor to afford means of enforcing agreements to surrender possession of real estate, where either that relation does not exist or has not existed. The foundation fact upon which the jurisdiction rests is that the tenant is in possession of the land in consequence and by virtue of that relation, and unlawfully withholds possession after a default in the performance of the terms upon which he entered, or after his term has expired." 28 Minnesota, 273.

Considering the terms of the act of Congress, the settled construction, before the passage of that act, of the statute of Massachusetts from which it appears to have been taken, and the general course of decision in this country under statutes on the same subject, the reasonable conclusion is that, in order to sustain this form of proceeding, the conventional relation of landlord and tenant must exist or have existed between the parties.

A mortgagee holds no such relation to a mortgagor in possession. The mortgagor, though loosely called a tenant at will of the mortgagee, is such in no other sense than that his possession may be put an end to whenever the mortgagee pleases. Lord Mansfield, in *Moss* v. *Gallimore*, 1 Doug. 279, 283; Lord Selborne, in *Lows* v. *Telford*, 1 App. Cas. 414, 426; Shaw, C. J., in *Larned* v. *Clarke*, 8 Cush. 29, 31; *Carroll* v. *Ballance*, 26 Illinois, 9, 19. The mortgagee may take possession

at any time; but, so long as there has been no breach of condition of the mortgage, this right is rarely exercised, and the mortgagor is usually permitted, by oral or tacit agreement with the mortgagee, or by express stipulation in the mortgage, to remain in possession. 2 Bl. Com. 158; *Moss* v. *Gallimore*, above cited; *Colman* v. *Packard*, 16 Mass. 39; *Flagg* v. *Flagg*, 11 Pick. 475, 477; *Jamieson* v. *Bruce*, 6 Gill & Johns. 72, 75; *Van Ness* v. *Hyatt*, 13 Pet. 294, 299. Until the mortgagee takes actual possession, the mortgagor is not liable, without an express covenant to that effect, to pay rent, and is entitled to take the rents and profits to his own use. *Teal* v. *Walker*, 111 U. S. 242, 248–251, and cases cited; *Freedman's Saving Co.* v. *Shepherd*, 127 U. S. 494, 502; *Larned* v. *Clarke*, above cited.

When the mortgagor remains in possession with the assent of the mortgagee, without formal agreement, no one would think of saying that there was a lease from the mortgagee to the mortgagor, or that the relation of landlord and tenant existed between them. An express stipulation in the mortgage, that the mortgagor may remain in possession until breach of condition, is intended merely to put in definite and binding form the understanding of the parties as to the exercise of their rights as mortgagor and mortgagee, and not to create between them a distinct relation of tenant and landlord. *Anderson* v. *Strauss*, 98 Illinois, 485.

That such was the understanding and intention of the parties to the deed of trust in this case is apparent from its terms, by which the American Ice Company mortgages all its real estate, wharves, icehouses and other buildings and machinery; and it is provided that, until default, the mortgagor "shall be permitted and suffered to possess, manage, develop, operate and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues and profits thereof, in the same manner, to the same extent, and with the same effect, as if this deed had not been made."

The result is, that the plaintiff is not entitled to maintain this process, but must be left, so far as the aid of a court of

Counsel for Plaintiff in Error.

justice is requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment, or a bill of foreclosure. Comp. Stat. D. C. c. 48, § 1; c. 55, § 10; *Hogan* v. *Kurtz*, 94 U. S. 773; *Hughes* v. *Edwards*, 9 Wheat. 489.

Judgment of the Court of Appeals reversed, and case remanded with directions to affirm the judgment of the Supreme Court of the District of Columbia.